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# REPORTS

OF

## CASES AT LAW AND IN CHANCERY

ARGUED AND DETERMINED IN THE

SUPREME COURT OF ILLINOIS.

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VOLUME 187.

CONTAINING CASES IN WHICH OPINIONS WERE FILED IN OCTOBER,  
1900, AND CASES IN WHICH REHEARINGS WERE DE-  
NIED AT THE DECEMBER TERM, 1900.

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ISAAC NEWTON PHILLIPS,  
REPORTER.

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SPRINGFIELD:  
1901.

Entered according to Act of Congress. In the year 1901, by  
ISAAC NEWTON PHILLIPS,  
In the Office of the Librarian of Congress at Washington.

*Rec. Feb. 15, 1901.*

*Pantagraph Printing and Stationery Co.  
Printers, Stereotypers, Binders,  
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DURING THE TIME OF THESE REPORTS.

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# CASES

## ARGUED AND DETERMINED

### IN THE

# SUPREME COURT OF ILLINOIS.

---

THE BURTON STOCK CAR COMPANY

v.

JOHN E. TRAEGER, Collector, *et al.*

*Opinion filed October 19, 1900.*

1. **TAXES**—*in absence of fraud, valuation of property is not subject to judicial supervision.* Section 1 of article 9 of the constitution, concerning the payment of taxes by every person or corporation in proportion to the value of property, to be ascertained by some person or persons to be elected or appointed in the manner provided by the General Assembly, excludes judicial supervision of the valuation of property except in case of fraud.

2. **SAME**—*equity will take jurisdiction to grant relief against fraudulent valuation.* If the valuation of property for taxation is so grossly out of the way as to indicate that the assessing body could not have been honest in its valuation, equity will take jurisdiction to grant relief, and, though the excessive valuation does not by itself establish fraud, the court may look into the attending circumstances to determine the honesty of the valuation.

3. **SAME**—*fraud by assessor may be purged by action of board of review.* Culpable neglect of duty, and even fraud by the assessor in valuing property for taxation, is purged by the hearing and action of the board of review, before whom the complaining tax-payer has voluntarily appeared and fully submitted his case, and against

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whose decision confirming the assessment he makes no charge of fraud or dishonest conduct.

4. SAME—*section 3 of the Revenue act of 1898 construed.* The provisions of section 3 of the Revenue act of 1898, creating a board of assessors in counties of 125,000 or more inhabitants, but making the township assessor *ex officio* deputy assessor in townships, in such counties, not lying wholly within the limits of one city, are not unconstitutional, as authorizing two classes of assessing bodies in Cook county, since they merely create two classes of deputy assessors, whose action is subject to review by the board of review and becomes its action when revised or adopted.

5. SAME—*act of 1898 is not special in dividing counties into classes for assessment.* The provisions of the Revenue act of 1898, dividing counties into classes for the purpose of assessing property for taxation, are not in violation of the constitutional provisions requiring uniformity of taxation and forbidding the passage of special laws regulating county or township affairs.

APPEAL from the Circuit Court of Cook county; the Hon. E. F. DUNNE, Judge, presiding.

This is a bill, filed by the appellant company, a corporation organized under the laws of the State of Maine, with its principal office at Portland in that State, against the town collector of the town of Lake, and the county collector of the county of Cook, to enjoin the collection of a tax against the personal property of the appellant in that town, upon the ground that the valuation of the property, as fixed by the board of assessors, was excessive and fraudulent. It appears from the allegations of the bill, that the appellant company is engaged in the business of renting, on a mileage basis, cars adapted to the transportation of all kinds of live stock, and has complied with the laws of Illinois, authorizing it to do business in that State, and has a branch office in the city of Chicago, and a shop, in which it repairs cars, belonging to it, and used in its business, in said town of Lake. The bill was demurred to by the defendants thereto, the appellees here. The court sustained the demurrer, and dismissed the bill for want of equity at complainant's costs, and dissolved the injunction, which had been issued upon

the filing of the bill upon the recommendation of a master in chancery. The present appeal is prosecuted from the decree, sustaining the demurrer, and dismissing the bill.

M. J. SCRAFFORD, and EDWARD A. BERN, for appellant.

JULIUS A. JOHNSON, County Attorney, and FRANK L. SHEPARD, Assistant County Attorney, for appellees.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

*First*—The main ground, upon which it is sought to enjoin the collection of the tax upon the personal property of the appellant company, is that the valuation of appellant's property in the town of Lake for the purposes of assessment by the board of assessors of Cook county was largely in excess of its real value. This court has often decided, that a court of equity will not entertain jurisdiction to enjoin the collection of a tax, upon the ground of the excessive valuation of the property, assessed by the assessing officer or officers.

Section 1 of article 9 of the constitution of 1870 provides that "the General Assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property—such value to be ascertained by some person or persons to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise." This provision of the constitution has been construed to mean, that the valuation of property for the purpose of taxation is to be ascertained by some person or persons elected or appointed by the legislature. The constitution expressly prohibits the ascertainment of such value by any other person than a person elected or appointed by the legislature. Hence, the courts have no power to fix the valu-

ation of property for taxation. The determination of the value to be fixed on property liable to be assessed "is not, in the absence of fraud, subject to the supervision of the judicial department of the State." (*Keokuk Bridge Co. v. People*, 185 Ill. 276; *Republic Life Ins. Co. v. Pollak*, 75 id. 292; *Spencer & Gardner v. People*, 68 id. 510). So far, therefore, as relief was sought by the bill in this case for the reason that the property assessed was valued at too high a figure, the action of the court below in sustaining the demurrer was proper.

*Second*—It has, however, been held that, where the valuation is so grossly out of the way as to show that the assessor could not have been honest in his valuation, and must have known of its excessive character, such valuation will be accepted as proof of a fraud upon his part against the tax-payer; and, in such case, a court of equity will grant relief. Whether or not there has been fraud in the excessive valuation of property for taxation is a question, which will depend largely upon the circumstances of each particular case, in which the valuation is made. The excessive valuation by itself does not establish fraud; but the attending circumstances may be looked into in order to determine whether or not the valuation was honestly made. (*Pacific Hotel Co. v. Lieb*, 83 Ill. 602; *New Haven Clock Co. v. Kochersperger*, 175 id. 383; *East St. Louis Connecting Railway Co. v. People*, 119 id. 182; *Spring Valley Coal Co. v. People*, 157 id. 543).

The attendant circumstances in this case, which are relied upon, in connection with the alleged excessive valuation, to show that such valuation must have been dishonestly made, are the alleged omissions, on the part of the board of assessors, of certain requirements of the Revenue act. Section 16 of the Revenue law of February 25, 1898, requires the assessor or his deputy to "call at the office, place of doing business or residence of each person required by this act to list property and list his name," and imposes upon such assessor or his deputy the

duty of requiring "such person to make a correct statement of the taxable property in accordance with the provisions of this act." Section 16 further provides that "the person listing the property shall enter a true and correct statement of such property owned by him on the first day of April of that year in the form prescribed by law, which shall be signed and sworn to to the extent required by this act by the person listing the property, who shall deliver such statement to the assessor; and the assessor shall thereupon assess the value of such property, and enter the valuation in his books." Section 17 of the act of 1898 provides, that "the assessor shall furnish to each person required to list personal property a printed blank schedule, forms to be furnished by the Auditor of Public Accounts, upon which shall be printed a notice" set forth fully in the section. Section 17 also provides that "every person required to list personal property or money shall fill out, subscribe and swear to, and return to the assessor, in person or by mail, at the time required, such schedule in accordance with law, giving the numbers, amounts, quantity and quality of all the articles enumerated in said schedule by him possessed, or under his control, required to be listed by him for taxation;" and that "the assessor shall determine and fix the fair cash value of all items of personal property, including all grain on hand on the first day of April, and set down the same, as well as the amounts of notes, accounts, bonds and moneys, in a column headed 'full value,' and ascertain and assess the same at one-fifth part thereof, and set down said one-fifth part thereof in a column headed 'assessed value,' which last amount shall be the assessed value thereof for all purposes of taxation." Section 19 of the act provides, that "the assessor shall require every person to make, sign, and swear to the schedule provided for by this act."

The bill charges, that the assessor did not call at the office of appellant, and list its name, and require it to

make a correct statement of its taxable property; that he did not furnish to appellant the printed blank schedule, with the printed notice thereon, so that it could fill out, subscribe and swear to, and return the schedule as the law directed; that the assessor did not require appellant to make, sign and swear to the schedule; that he did not appraise the property at its fair cash value, etc.; and that he did not determine and fix the fair cash value of the property by items. Appellant did not make or return any schedule

Appellant claims, that the failure of the assessor to call upon it, and furnish the blank schedule, and do the other things above mentioned, considered in connection with the excessive valuation of the property, indicates a fraudulent and corrupt intent on the part of the officials, clothed with the power to value and assess its property. The requirements of the act of 1898, as above set forth, are said to be mandatory in their character; and it is insisted that, without a compliance with them, the assessor had no authority to make a valuation or assessment of the property. It was undoubtedly a culpable neglect of duty, on the part of the assessor or his deputy, to fail to call upon the appellant, and furnish it with a printed blank schedule, and do the other things required by sections 16, 17 and 19, of the act, as above referred to. (*Pacific Hotel Co. v. Lieb, supra*). But whether or not a failure to comply with these requirements operated to make the assessment void is a matter, which it is not necessary to decide in this case. A different question would have been presented, if the appellant had not appeared before the board of review as hereinafter stated.

But the appellant alleges in its bill, that its general manager appeared before the board of review, and gave that board full information in regard to its personal property in the town of Lake, and of what the property consisted, and what its full fair cash value was. The bill makes no charge of fraud against the board of review.

It simply alleges, that the board of review "for some inexplicable reason, unknown to complainant, made no change in said assessment \* \* \* made by the board of assessors upon its said property." By section 34 of the act of 1898, the board of review, at the meeting therein provided for, "upon application of any tax-payer or upon their own motion, may revise the entire assessment or any part thereof of any tax-payer, and correct the same as shall appear to them to be just," increasing no taxpayer's assessment without giving him notice in writing and the opportunity to be heard, etc. By section 35 of the act, the board of review has power to "assess all property subject to assessment which shall not have been assessed by the assessors." By the same section, "on complaint in writing of any person or corporation that his or its property has been assessed too high, they shall review the assessment and correct the same, as shall appear to be just. \* \* \* The board, also, upon its own motion, may increase, reduce or otherwise adjust the assessment of any individual or corporation, and shall have full power over the assessment of any individual or corporation, and shall have full power over the assessment and may do anything in regard thereto that the assessors might and could originally have done," etc.

The appellant voluntarily submitted itself to the jurisdiction of the board of review, and presented for the consideration of that board all the facts in regard to the value of its personal property, which, as it claims, it had no opportunity of presenting to the board of assessors. The board of review had full power to correct the assessment if it was unjust in any respect. They did not change the valuation, placed upon appellant's property by the board of assessors, but allowed such valuation to remain as made. As the board of review is not charged with having been guilty of any fraud, it will be presumed that they did their duty, and exercised, in a fair and reasonable way, the judgment and discretion conferred upon

them by the statute. If there was a mistake in the judgment of the board of assessors, or even fraudulent conduct on their part in making the valuation, such mistake or fraud is purged by the hearing, review and action of the board of review. Such was the holding of this court in regard to a similar proceeding under the old Revenue law, before the adoption of the recent act of 1898.

In *Spring Valley Coal Co. v. People*, 157 Ill. 543, we said (p. 548): "Even if we should assume that the values as fixed by the assessor of the town of Hall were fraudulently made by him, the results claimed by appellant do not follow. It petitioned the town board of review, and secured reductions in some of the values. It then appealed to the county board, and had before it a full hearing as to its supposed grievances, and secured from it still further reductions of values. There is no intimation, that the county board was governed or influenced by either fraud or intimidation. Appellant, having availed itself of the remedies afforded by the statute, the decision made by the board of supervisors was final and conclusive, and it must be regarded that the fraud, if any, that there was in the original assessment, was purged out of it; otherwise it would be in the power of appellant, by securing the election of a prejudiced or dishonest assessor, to avoid the payment of any taxes whatever upon its large and valuable property." The same doctrine is announced in the case of *New Haven Clock Co. v. Kochersperger*, *supra*. Inasmuch as the appellant here availed itself of the remedy afforded by the statute, and went before the board of review with its complaint against the action of the board of assessors, the decision made by the board of review must be regarded as final and conclusive. Whatever fraud there may have been in the original assessment was purged out of it by the action of the board of review.

For the reasons thus stated, we are of the opinion that the acts of omission, charged against the board of



assessors, or the assessor, or his deputy, taken in connection with the alleged over-valuation, did not entitle appellant to relief under its bill, in view of the allegation therein that it appeared before the board of review, and presented its case fully to that board, and, in view of the further fact, that it makes no charge of fraud or dishonest conduct or intention against the latter board.

*Third*—It is further charged in appellant's bill, that the provisions of the law, under which the assessment was made, are void upon the alleged ground that such provisions cut the city of Chicago into two parts for assessment purposes, one part to be assessed by the township assessor, and the other part by the board of assessors. In support of this contention, counsel for appellant refer to, and quote, the following provisions from section 3 of the act of February, 1898, to-wit: "In all counties of this State containing 125,000 or more inhabitants there is hereby created and established a board of assessors, consisting of five persons, not more than four of whom shall be residents of any one city, to be known as the board of assessors of said county. \* \* \* In all townships in such counties not lying wholly within the limits of one city the township assessor shall be *ex officio* the deputy assessor to make the assessments in the township wherein he is elected," etc.

It is contended on the part of the appellant, that the board of assessors is thus left to make the assessment in such townships only as lie wholly within the limits of one city. Counsel say, that that part of the city, embraced within townships not lying wholly within the limits of the city, must be assessed by township assessors, while the other portion of the city must be assessed by the board of assessors. We do not think that the act is unconstitutional in the respect thus indicated. It is not clear, that the legislature intended assessments in Cook county within the limits of the city of Chicago to be made by one class of assessors, and assessments in

the county outside of the city to be made by another class. As a matter of fact, there is but one class of assessors. The law provides for one board of assessors for the whole county. There are two classes of deputy assessors, those appointed by the board for the city, and those elected for the towns outside of the city; but the difference is only in the fact, that one class is appointed, and the other is elected. Both are deputy assessors only, and are under the direction and supervision of the board of assessors. The work of both is subject to the revision and approval of the board of assessors, and becomes the work of that board, when it is revised or adopted by such board.

Counsel say, that the law in the respect now under consideration, is local and special to that particular locality in the city, where the power to assess is lodged in the board of assessors, and in that respect regulates township and county affairs in violation of the constitution. The contrary view was held by this court in *People ex rel. v. Comrs. of Cook County*, 176 Ill. 576. In the latter case, it was held that the act of 1898 was not special in its division of counties into classes for the purposes of assessments. It was also there held, that the act of 1898 did not violate the requirement of uniformity in taxation; and it was also there further held that the act did not violate section 22 of article 4 of the constitution, forbidding the passage of special laws regulating county and township affairs; and in that case we used this language (p. 588): "It does not purport or attempt to regulate county and township affairs, but the sole object of the act is to provide means for the assessment of property, and it cannot be said that, by doing so, the legislature has attempted to regulate the county and township affairs of any county or township by a special law, as the act is applicable to the whole State, and, for the purpose of facilitating and regulating assessments, so that they shall be uniform and more satisfactory than heretofore,

has classified the counties of the State." (See, also, *People ex rel. v. Onahan*, 170 Ill. 449; *People v. Knopf*, 183 id. 410).

The decree of the circuit court, sustaining the demurrer and dismissing the bill, is affirmed.

*Decree affirmed.*

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ENNO STAUDE *et al.*

*v.*

GEORGE F. TSCHARNER *et al.*

*Opinion filed October 19, 1900.*

**WILLS**—*right to file bill to contest will does not pass by descent or inheritance.* The right to file a bill to set aside a will and its probate is not assignable, nor does it pass by descent or inheritance.

WRIT of ERROR to the Circuit Court of Washington county; the Hon. M. W. SCHAEFER, Judge, presiding.

UPTON M. YOUNG, ALEXANDER YOUNG, and WILLIAM H. BENNETT, for plaintiffs in error.

CHARLES T. MOORE, and JAMES A. WATTS, for defendants in error.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The circuit court of Washington county sustained the demurrer of defendants in error to the bill in equity of plaintiffs in error. The complainants elected to stand by their bill, and there was a decree against them dismissing the bill and for costs.

The scope of the bill and its purpose are stated by counsel for plaintiffs in error, as follows: "This is a suit in equity, the object of which is to cancel the supposed last will and testament and two supposed codicils of Augustus Staude, deceased, and to declare said three instruments in writing, and the probate thereof, null and void

and not the last will and testament of the said Augustus Staude, deceased, and that his estate be distributed among his heirs according to law. No other relief is sought by complainants' suit in equity."

The demurrer challenges the right of complainants to maintain the bill for the purposes stated, and the facts upon which the right is claimed, as alleged in the bill and admitted by the demurrer, are as follows: Augustus Staude died April 18, 1896, after having executed the will and codicils in question. He left no widow nor child nor descendant of a child, and his only heirs were his two brothers, Robert Staude and Franz Staude. The will was probated in May, 1896. Robert Staude died January 14, 1898, leaving complainants and one of the defendants his only heirs. Franz Staude, the other heir, died in September, 1898, and left heirs who were made defendants. The bill to set aside the will was filed February 26, 1900. The complainants claim an interest in the estate through Robert Staude, who was one of the heirs of Augustus Staude at the date of the probate of the will, but none of them were heirs of Augustus Staude or interested in his estate at the time of such probate.

Robert Staude and Franz Staude, the heirs-at-law of Augustus Staude, the testator, had a right given them by statute to contest the will, but neither of them contested it or attempted to do so. The right to file a bill to set aside the will and codicils and probate was not assignable, and did not pass by descent or inheritance to the complainants. They had no right to file the bill. (*Storrs v. St. Luke's Hospital*, 180 Ill. 368.) The court was right in sustaining the demurrer.

The decree of the circuit court is affirmed.

*Decree affirmed.*

LOUIS T. KUESTER *et al.*

v.

THE CITY OF CHICAGO.

*Opinion filed October 19, 1900.*

**SPECIAL ASSESSMENTS—admission of extrinsic evidence not presumed in case of judgment by default.** If a confirmation judgment is entered by default, without any hearing of objections or upon any issue in the case, it must be presumed, on appeal, in the absence of a bill of exceptions, that the trial court held the ordinance to be sufficient on its face, and not that extrinsic evidence was heard to cure a defective description by showing that the terms used had a well known and established local meaning.

MAGRUDER, J., does not concur in reasoning of opinion.

WRIT OF ERROR to the County Court of Cook county;  
the Hon. RICHARD YATES, Judge, presiding.

WILLIAM F. CARROLL, and M. F. CURE, for plaintiffs  
in error.

CHARLES M. WALKER, Corporation Counsel, ARMAND  
F. TEEFY, and WILLIAM M. PINDELL, for defendant in  
error.

Mr. JUSTICE CARTER delivered the opinion of the court:

This writ of error was sued out to reverse a judgment by default, confirming a special assessment levied to curb, fill and pave certain streets in the city of Chicago.

The ordinance provided that the curb-stones should be firmly bedded on *flat stones*. The flat stones were not otherwise described in the ordinance. We have held in numerous cases that such an ordinance is defective because of the insufficiency of the description of the stones upon which the curb-stones are to be bedded. See *Lusk v. City of Chicago*, 176 Ill. 207, *Foss v. City of Chicago*, 184 id. 436, and other cases.

It is urged, however, that as there is no bill of exceptions in this case it will be presumed, in support of the

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193	325
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judgment, that the court heard any and all admissible evidence explanatory of the term "flat stones," and that it thus appeared to the court that that term had acquired a local and well known meaning among those engaged in making improvements of such a character; that the descriptive term employed was used in the ordinance in this local and well known sense, and that therefore the apparent defect on the face of the ordinance was cured. We have held in several cases that where it is proved that the descriptive term used in the ordinance has a well known and established meaning the apparent defect in description will be removed. (*Shannon v. Village of Hinsdale*, 180 Ill. 202; *Levy v. City of Chicago*, 113 id. 650; *City of Danville v. McAdams*, 153 id. 216; *Village of Hinsdale v. Shannon*, 182 id. 312; *Latham v. Village of Wilmette*, 168 id. 153.) Thus, in the *Levy* case we held that where it appeared that the word "filling" had a definite and well known meaning in Chicago in reference to street improvements, it would "be presumed that the framers of the ordinance, in the use of the word, intended that it should be expounded and received in the sense it was generally understood in that locality." And it was there further said: "If, then, the ordinance had a well known meaning in Chicago, where the improvement was to be made, the ordinance cannot be regarded as indefinite or uncertain." We have no doubt of the correctness of that decision.

It appeared, however, in that case and in others, that under objections filed to the confirmation, evidence was heard explaining those words and terms, which, without such evidence and according to their commonly accepted meaning, left the ordinance defective for lack of certainty of description of the improvement. There is no such evidence in the record in the case at bar, but it is said we must presume, in the absence of a bill of exceptions, as this is a case at law, that such evidence was heard by the trial court, else that court would not have rendered the judgment. The rule at common law is well understood,

but if that rule be applied to this statutory proceeding, still we are of the opinion that such a presumption can not be indulged upon this record. The judgment was by default, without any hearing of objections or upon any issue in the case. The assessment was confirmed upon default of the property owners, as provided by section 30 of article 9 of the act for the incorporation of cities and villages, and the presumptions arising from the recitals in the record are that the ordinance and proceedings were held sufficient by the court below on their face, and not that they were found sufficient after the hearing of extrinsic evidence. Without evidence it would be presumed that the words "flat stones" were used in their general and commonly accepted sense, and not according to some local or technical meaning.

The judgment is erroneous on its face, and the proceedings are insufficient to support the judgment. Such insufficiency may be taken advantage of on writ of error. *Clark v. City of Chicago*, 155 Ill. 223.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with the views we have expressed.

*Reversed and remanded.*

Mr. JUSTICE MAGRUDER, dissenting:

I concur in the conclusion reached by the foregoing opinion, but not in the reasoning by which that conclusion is supported.

The ordinance in this case was passed on the 6th day of January, 1896, by the city council of Chicago. The commissioners, appointed by the council to estimate the cost of the improvement, made an estimate, which was approved on January 13, 1896. Section 1 of the ordinance provides: "That the roadway (of the respective streets) be and the same are hereby ordered curbed with the best quality of limestone curb-stones, said curb-stones to be four feet long, three feet deep and five inches in thickness, with the top edge full and square. Each curb-stone

to have a straight base the whole length and to be firmly bedded upon flat stones."

Section 1 of the ordinance, which is involved here, is the same as section 1 of the ordinance, which came under the consideration of this court in *Lusk v. City of Chicago*, 176 Ill. 207. We there said: "It is not mentioned in the ordinance here what kind of stones the flat stones shall be upon which the curb-stones are to be bedded. Whether they are to be granite, sandstone, limestone or of some other quality is not disclosed by the ordinance, nor is there any specification of the size or shape, except that they are to be flat and machine dressed. No intelligent estimate could be made by the commissioners of the cost of the stones unless the length, width, thickness and kind or quality were disclosed by the ordinance. As to the curb-stones, the ordinance provides that they shall be of the best quality of limestone, to be not less than four feet long, three feet deep and five inches in thickness, but as to the flat stones, nothing is said in regard to their nature or character." The case of *Lusk v. City of Chicago*, *supra*, was brought to this court by appeal on the part of the property owners from a judgment of confirmation.

In *Davidson v. City of Chicago*, 178 Ill. 582, the ordinance involved was similar to the one under review in *Lusk v. City of Chicago*, *supra*; it required the roadway of the street to be curbed with curbing-stones four feet in length, three feet in depth and five inches in thickness, and that each of such curb-stones shall "be firmly bedded upon flat stones;" it contained no other or further description of the flat stones, upon which the curb-stones were to rest. In *Davidson v. City of Chicago*, *supra*, we quoted the foregoing extract, except the last sentence, with approval, and said: "Upon the authority of that decision, we must hold the ordinance under consideration to be insufficient." The case of *Davidson v. City of Chicago*, *supra*, was brought to this court by writ of error, sued out from this court to



bring in review a judgment of the county court of Cook county, confirming a special assessment.

As the ordinance, in the case at bar, is substantially the same as the ordinances held to be invalid in *Lusk v. City of Chicago*, *supra*, and *Davidson v. City of Chicago*, *supra*, the decisions in the two latter cases are decisive of the controversy in this case. The ordinance here, the first section of which has been quoted above, is invalid for the reasons set forth in the two cases above referred to.

Counsel for the defendant in error seek to draw a distinction between the case at bar and the *Lusk* case, upon the ground that, in the latter case, a bill of exceptions was presented, and it was thereby shown, that no evidence was introduced at the trial to prove that the term "flat stones" had a settled and well known meaning, when used in connection with the improvement of streets, whereas, as it is claimed, no bill of exceptions was presented in the case at bar, and, therefore, the court must presume that proper evidence was introduced at the trial below to cure the alleged defect in the ordinance. In other words, counsel for defendant in error assume that the defect in the ordinance, as above stated, could have been cured at the trial by the introduction of evidence, and that, in the absence of a bill of exceptions, this court must presume such evidence to have been introduced.

Section 134 of chapter 24 of the Revised Statutes of 1874 provides as follows: "Whenever such local improvements are to be made wholly or in part by special assessment, the said council in cities, or board of trustees in villages, shall pass an ordinance to that effect, specifying therein the nature, character, locality and description of such improvement." By an act approved June 17, 1887, said section 134, which is section 19 of article 9 of the City and Village act of 1872, was amended by adding to the portion thereof above quoted the following words: "Either by setting forth the same in the ordinance itself

or by reference to maps, plats, plans, profiles or specifications thereof on file in the office of the proper clerk, or both." The statute as originally passed and as subsequently amended thus required that the nature, character, locality, and description of the improvement should be set forth in the ordinance itself, or by reference to maps, plats, plans, profiles or specifications thereof on file in the office of the proper clerk. The language of the statute excluded the right to make any specification of the nature, character and description of the improvement by the introduction of oral testimony; it required that the ordinance should be sufficient in itself, either upon its face or by the reference therein required, without any reliance upon outside testimony. (*City of Alton v. Middleton's Heirs*, 158 Ill. 442).

In the case at bar, the ordinance, as has already been stated, was passed in January, 1896, and the petition for assessment of the cost of the improvement was filed in January, 1896. When the ordinance here was passed, and the petition in this case was filed, the act of 1874 as so amended was in force, and, therefore, the ordinance itself should have specified the nature and character of the stones therein referred to. Not having contained such specification, the ordinance was invalid, and this court cannot presume, even in the absence of a bill of exceptions, that any oral evidence was introduced to cure the defect, because such oral evidence would have been improper under the statute as it then existed. An ordinance which is invalid is void, and not merely defective or insufficient. (See definition of "invalid" in Webster's Dictionary; 11 Am. & Eng. Ency. of Law, p. 780; *State v. Casteel*, 110 Ind. 174).

Section 8 of the act of June 14, 1897, "concerning local improvements," provides that the ordinance to be drafted and recommended by the board of public works "shall prescribe the nature, character, locality and description of such improvement," and although it does not contain

the words in the amendatory act of 1887, which require the nature, character, locality, and description of the improvement to be set forth by reference to the documents therein referred to, yet its language is such as to exclude the idea that parol testimony can be introduced to explain or qualify the terms of an ordinance. Oral testimony cannot be introduced to show the size or shape or dimensions, as to length, width, and thickness, of the flat stones referred to in the ordinance. The *Lusk case* and the *Davidson case* and the case of *Gage v. City of Chicago*, 179 Ill. 392, condemn the ordinances in those cases, not only because they did not specify the size, shape or dimensions of the flat stones, but because they did not specify what kind of stones the flat stones were to be, whether granite, sandstone, limestone or of some other quality, so that oral testimony as to the kind of stones the flat stones were to be must also be excluded. There may be one or two cases reported where the facts show that such testimony was received, but in those cases it will appear, upon examination, that no objection was made by either side to the introduction of the oral testimony offered to explain the terms used in the ordinances, and that the attention of the court was not called to the question of the admissibility of such testimony.

I think that the cases of *Lusk v. City of Chicago*, *supra*, and *Davidson v. City of Chicago*, *supra*, and *Gage v. City of Chicago*, *supra*, were correctly decided, and that the doctrine announced in those cases is decisive of the case at bar; therefore, that the ordinance here involved is invalid, even upon a record without a bill of exceptions, such as is here presented; and that, such ordinance being invalid, is necessarily void.

JOSEPH T. DONOVAN

v.

THE CONSOLIDATED COAL COMPANY OF ST. LOUIS.

*Opinion filed October 19, 1900.*

1. **TRESPASS**—*one knowingly authorizing another to mine third party's coal is a trespasser.* One who knowingly assumes to grant to a mining company the right to mine coal belonging to a third party, and who receives the price for coal so mined, is a trespasser, notwithstanding he does not participate in mining the coal other than by authorizing the mining company to do so.

2. **SAME**—*measure of damages where one mines coal belonging to another.* One who through negligence or inadvertence mines coal belonging to another is liable for the value of the coal so mined in its severed condition, and is not entitled to any allowance for the digging.

*Donovan v. Consolidated Coal Co.* 88 Ill. App. 589, affirmed.

**APPEAL** from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of St. Clair county; the Hon. M. W. SCHAEFER, Judge, presiding.

DILL & WILDERMAN, and GEORGE C. REBHAN, for appellant.

CHARLES W. THOMAS, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Appellant owned a tract of twenty-four and a half acres of land in St. Clair county, in which was a coal mine known as the "Johnson mine." He also owned the surface of an adjoining tract on the west, containing one hundred and thirty-five acres, but appellee owned the coal under said surface, which had been conveyed to it before appellant obtained his title to the surface. On October 1, 1896, appellant entered into a written contract with the St. Louis and O'Fallon Coal Company, Edward L. Thomas and John T. Taylor, by which he leased to them, for the term of five years from said date, the John-

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son mine, with one acre of ground around the shaft and the machinery and appurtenances, and also granted to them the right to mine and remove the coal underlying said lands, including the coal of appellee, to which he did not have or claim any title, and they agreed to pay him a certain price per ton for all the coal so mined. Under this contract the St. Louis and O'Fallon Coal Company went into possession of the mine, and on November 30, 1896, sub-let said mine to Thomas Davis and others, with the right to mine and remove said coal during said term, for which coal the St. Louis and O'Fallon Coal Company was to pay certain prices per ton stipulated in the contract. Under these arrangements, and by virtue of the right which appellant assumed to grant, over five thousand tons of coal owned by appellee under the one hundred and thirty-five acres were mined and removed. Appellant was paid the price specified in his contract per ton for said coal. Appellee brought this action of trespass in the circuit court of St. Clair county against appellant and the parties who mined and removed the coal, to recover damages occasioned by such mining and removal of its coal. The defendants pleaded the general issue, and a jury being waived there was a trial by the court. There was a non-suit as to all the defendants except the appellant, and there was a finding and judgment against him for \$2500 and costs. On appeal to the Appellate Court the judgment was affirmed.

The court held as law a proposition submitted by the plaintiff, that if the plaintiff was the owner of the coal and the defendant Donovan made the contract authorizing and empowering the St. Louis and O'Fallon Coal Company, Edward L. Thomas and John T. Taylor to enter upon said coal and dig and carry the same away in consideration of the price per ton to be paid said defendant, and said lessees made some arrangements with other parties under which they dug the coal and defendant received said price per ton, he was guilty of the trespass.

The court refused to hold that if the defendant Donovan did not participate in mining the coal otherwise than by making the contract under which it was dug and mined, then he was not liable for the trespasses. The action of the court on these propositions is assigned as error, on the ground that the contract of the defendant Donovan did not create any such relation between him and the other parties, or give him any such control over them, as to make him liable for their trespasses. There are cases where a liability may arise out of the relation of the parties, as, a master may become liable for the act of a servant or a principal for that of his agent although not authorized by him. But questions of that kind are immaterial in this case. It was not sought to hold Donovan liable for some act not authorized by him, but the trespass for which the suit was brought was the identical thing authorized by him. He undertook, without the consent of the plaintiff, to dispose of its coal, and the question is not the same as whether he would have been responsible for a trespass upon adjoining property not mentioned in his contract. Donovan authorized the other parties to commit the trespass in part for his benefit. He authorized them to take plaintiff's coal, and they took it and paid him a stipulated price per ton, and as he authorized and directed the trespass he is bound to answer to the plaintiff.

The coal was worth on the cars at the mouth of the pit sixty-five cents a ton, and the cost of bringing it from where it was mined and putting it on the cars was thirteen cents a ton. On the measure of damages the court held as correct the proposition of law submitted by plaintiff, that such measure of damages was the full value of the coal at the mouth of the pit less the cost of transporting it from the place where it was dug to the mouth of the pit, and if it was loaded upon railroad cars, the measure of damages was its value after it was so loaded less the cost of transporting it from the place where it

was dug and loading it upon the cars. It is argued that the measure of damages stated in these propositions is not applicable to the case because the defendant was not a willful trespasser, and that, in such case, the measure of damages should be the value of the coal as it was in the bank or earth before it was mined. Defendant testified that he had never been in the possession of the coal owned by appellee and never claimed title to it; that he knew it was owned by the plaintiff; that he had a large plat upon the wall in his office, and in making the contract failed to remember that the coal had been sold to plaintiff, and that he could give no other explanation of his contract and never intended to dispose of plaintiff's coal. The rule contended for was given in *Robertson v. Jones*, 71 Ill. 405, but this court reversed the judgment because of giving it, and laid down the rule stated in the proposition in this case. Afterward, in the case of *Illinois and St. Louis Railroad and Coal Co. v. Ogle*, 82 Ill. 627, this question of the measure of damages was fully considered. In that case the trial court instructed the jury that if the defendant, by its servants and employees, mined coal from the plaintiff's land without his consent, as alleged in his declaration, and did so by mistake or inadvertence, without knowledge that the coal was being mined from the plaintiff's land, the jury were bound to allow plaintiff the value of the coal at the pit mouth less the cost of carrying it from the place where it was dug, allowing defendant nothing for the digging. The instruction was held to be correct, and the court, upon a review of authorities, said (p. 630): "No necessity exists for one miner to trespass upon an adjoining owner. If proper maps and plans of the mine are kept and measurements and surveys of the work made, as required by common prudence and the statute, each miner will have no difficulty in confining his operations to his own estate. When, therefore, one miner, in disregard of his duty, invades the property of another, he should not be permitted to

profit by his unlawful act, which would be the case if the trespasser was only required to pay the value of the coal as it existed in the mine before it was taken." In *Illinois and St. Louis Railroad and Coal Co. v. Ogle*, 92 Ill. 353, the court declined to change the rule adopted, and expressed the belief that it rested on sound legal principles and was suggested by a wise and just policy.

Although the value of coal may be increased by mining it and removing it to the surface by the labor of the wrongdoer, the owner is entitled to its full value in its severed condition, and the trespasser can take no advantage of his labor. There was no disputed title to the coal, and the defendant Donovan did not grant the right to mine and carry it away under a *bona fide* belief that he had a right to do so. His act in granting the right to mine it and take it away was not the result of an innocent mistake, but of his own negligence. The measure of damages stated in the proposition was correct. *Hilliard on Torts*, 419; 1 *Addison on Torts*, par. 458.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

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CLARENCE E. BLACKMER

v.

THE SUMMIT COAL AND MINING COMPANY.

*Opinion filed October 19, 1900.*

1. **PRINCIPAL AND AGENT**—*one dealing with agent acts at his peril.* One dealing with agent does so at his peril, and when the agent's authority is in writing is bound to take notice of its terms.

2. **SAME**—*agent's contract of appointment construed.* A contract by which a coal mining company employs a party as sole salesman for one year, with power to sell "all coal mined" by the company, and which provides for the fitting up of an office for such agent at a certain place, contemplates the sale, on the market, of coal mined and consigned to the agent from day to day, and does not authorize him to sell the entire future output of the mine for ten months.

*Blackmer v. Summit Coal and Mining Co.* 88 Ill. App. 636, affirmed.

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APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of St. Clair county; the Hon. SILAS COOK, Judge, presiding.

This is an action of assumpsit brought by appellant to recover damages for breach of an alleged contract to furnish coal. The trial below was before a jury and resulted in a verdict and judgment for appellee. This judgment has been affirmed by the Appellate Court, and the present appeal is prosecuted from such judgment of affirmance.

The contract sued on, which is set out *in hæc verba* in the first count of the declaration, is as follows:

“ST. LOUIS, Mo., June 15, 1896.

“This agreement, made and entered into by and between the Summit Coal and Mining Company, an Illinois corporation, located at Birkners, Ill., party of the first part, and C. E. Blackmer, doing business as the Hart Coal Company of St. Louis, State of Missouri, party of the second part:

“*Witnesseth:* The said Summit Coal and Mining Company hereby agrees to furnish the said C. E. Blackmer bituminous standard coal mined by the Summit Coal and Mining Company at Birkners, Ill., same to be screened, merchantable coal, in car-load lots, not to exceed five cars per day, for forty (40) cents per ton at the mines, payable on the 10th of each month for all coal used the previous month, beginning June 15, 1896, and continuous for a period of ten months; and in consideration of the above agreement the said C. E. Blackmer hereby agrees to take all the said soft coal of standard quality that his business will require, and agrees to sell no other soft coal of standard quality.

SUMMIT COAL AND MINING CO.,

Per JOHN MADDOX, Agent.

“Witness: JOS. H. BARR.

C. E. BLACKMER.”

Appellee pleaded the general issue, verified by affidavit, and a special plea setting up fraud and circumvention.

On the 25th day of May, 1896, the appellee, a coal mining corporation, was engaged in operating a small coal mine, with a capacity of about three car-loads per day, at Birkners Station, in St. Clair county, Illinois.

In order to provide for the sale of its coal on the market in the city of St. Louis, appellee on that day made the following contract with one John Maddox, as its agent:

"This agreement, made and entered into this 25th day of May, A. D. 1896, by and between the Summit Coal and Mining Company of Birkners, of the county of St. Clair and State of Illinois, parties of the first part, and John Maddox of St. Louis, of the county of.....and State of Missouri, party of the second part: -

"*Witnesseth:* The aforesaid Summit Coal and Mining Company does hereby agree to hire the aforesaid John Maddox for the term of one year from the date hereof, to act as salesman and collector of all coal mined by the said Summit Coal and Mining Company. The said Summit Coal and Mining Company does further agree to give said John Maddox sole power to sell all the said coal mined by the said Summit Coal and Mining Company. The said Summit Coal and Mining Company does further agree to fit up and maintain (at their expense) an office in the city of St. Louis, State of Missouri, for the use of the said John Maddox, and further agrees to pay unto the said John Maddox a monthly sum of not less than sixty dollars (\$60), said salary to be increased from time to time as business increases. The aforesaid John Maddox does hereby agree to at all times to sell all coal mined, at the best possible price, and to use every precaution in selling to avoid bad risks, and does also further agree to at any time have his books ready for inspecting or auditing on demand by the said Summit Coal and Mining Company, or any duly authorized agent of theirs, and does further agree to pay over to the said Summit Coal and Mining Company all moneys collected by him (less disbursements) at the end of each and every fiscal month during his year of employment by said Summit Coal and Mining Company.

[Seal.]

W. H. BEAMONT, *Pres.*,  
J. SCHNEIDER, *Secy.*,  
Per SUMMIT MINING CO.  
JOHN MADDOX."

On the 15th day of June, 1896, Maddox executed the contract sued on. At that time he occupied an office in the city of St. Louis with appellant. Appellant was familiar with the capacity of appellee's mine, its location, its method of operating the same and handling its coal, and knew he was contracting for more coal than

appellee was able to furnish, at a price much below its value, and that it would render the continued employment of Maddox at \$60 a month and the payment to him of \$15 per month for office rent unnecessary. As soon as appellee learned of the execution of such contract it repudiated it, and denied Maddox's authority to make the same or to make any contract for the sale in gross of the future output of its mine.

AUGUST REBENACK, GUSTAVUS A. KOERNER, and VICTOR K. KOERNER, for appellant.

DILL & WILDERMAN, for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

The judgment of the Appellate Court settled all questions of fact adversely to appellant.

The contract appointing Maddox agent for appellee did not authorize him to execute the contract of June 15, 1896, with appellant, and thereby bind appellee. By the terms of the contract Maddox is authorized to sell all coal mined by the appellee. He is given no power or authority to sell coal not already mined. His authority is limited to the sale of coal that is mined and consigned to him for sale. To enable him to do this the appellee agreed to fix up and maintain at its own expense an office in the city of St. Louis for the use of Maddox, and to pay him a salary of not less than \$60 per month for one year, he agreeing to at all times sell all coal mined by appellee at the best possible price. It was the evident intention of the parties making this contract that the company should be represented in the daily market of St. Louis, and that the product of its mine should be sold from day to day at the best possible price.

We find no authority conferred upon Maddox, by the terms of his employment, to bind appellee by a sale to appellant of the entire product of its mine for the period

of ten months. The contract of Maddox's employment will bear no such construction. A person dealing with an agent does so at his peril, and when the agent's authority is in writing is bound to take notice of the terms thereof. *Peabody v. Hoard*, 46 Ill. 242; *Reynolds v. Ferree*, 86 id. 570; *Bissell v. Terry*, 69 id. 184; *Hartford Fire Ins. Co. v. Wilcox*, 57 id. 180.

As the contract sued on is not binding upon appellee, we deem it unnecessary to enter upon a discussion of the other questions raised by appellant's assignment of error and brief.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

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ELIZABETH C. TRAFTON

v.

ANDREW G. BLACK, EXR.

*Opinion filed October 19, 1900.*

1. *WILLS*—when charitable trust will not be held void for uncertainty. A charitable trust created by will will not be held void for uncertainty as to the persons or objects to which it is to be applied, if there be some one appointed by the will to make the selection and render such persons or objects certain.

2. *SAME*—charitable bequest construed as valid. A bequest to the testator's executor in trust, for the purpose of erecting church buildings within the limits of prescribed territory for certain named denominations, creates a public charitable trust, and is not invalid because the trustee is given discretionary power to select the sites within such territory, and the particular denominations, from those named, to be the objects of the testator's bounty.

APPEAL from the Circuit Court of White county; the Hon. P. A. PEARCE, Judge, presiding.

ORGAN & ASHLEY, and I. T. SPENCE, for appellant.

J. I. MCCLINTOCK, and C. S. CONGER, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Silas W. Powell, Sr., of White county, died leaving a last will and testament, of which he appointed the appellee, Andrew G. Black, executor. The will was admitted to probate. It gave the estate to the executor in trust, to apply it, after the payment of debts and expenses, to the erection of church buildings for certain specified denominations within a prescribed territory, with a discretionary power in the selection of places and religious denominations. The appellant, Elizabeth C. Trafton, a sister and one of the heirs of the testator, filed her bill in this case against the other heirs-at-law and said executor to set aside said will as void on its face because of the uncertainty of its provisions and the discretion left to the executor and trustee. The language of the will upon this question is as follows:

*"Second—*I give and bequeath to Andrew G. Black, the executor of this my last will hereinafter nominated, and to his successor in trust to be appointed as hereinafter set forth, all my real and personal estate in trust, to be applied to the following uses and purposes, namely: First, to the payment of my funeral expenses, my just debts, and the expenses of settling my estate and of executing the provisions of this will, and all the remainder of my estate of every nature, subject to the provision to Sarah E. Jones hereinafter set forth, shall be applied by the said Andrew G. Black, and by his successor in trust, to the erection of church buildings in that part of Illinois bounded on the north by the main line running east and west of the present Baltimore and Ohio Southwestern railway, such church buildings to be for any of the following denominations, viz.: Regular Baptist, Missionary Baptist, Free-Will Baptist and Cumberland Presbyterian, or the denominations usually called by those names; and this use and purpose to be carried out and completed

within five years after my death, except as to the provision made for Sarah E. Jones. \* \* \* I hereby give to the said Andrew G. Black, and to his successor in trust, full discretion as to the amount to be paid for any church building, and give to him, or to his successor in trust, the right to select the places for such buildings and the denominations for which the same shall be built, subject only to the restriction as to territory and denomination hereinbefore expressed; and I give to him and to his successor in trust power to sell any of my real estate at public or private sale, without the intervention of any court, and to execute deeds therefor."

Sarah E. Jones, for whom the provision mentioned in the will was made, died before the testator. The bill was answered by the executor, admitting the facts alleged but denying that the will was invalid for any reason. The answer of the guardian *ad litem* for minor defendants was in the usual form, and the answers were replied to. The cause was submitted to the court on the bill, answers and replications under a stipulation of the parties, and the court sustained the will and dismissed the bill for want of equity. A similar stipulation is made in this court, that the case shall be decided upon the bill, answers and replications upon the question whether the will "is void because of being too uncertain in its terms and provisions, or whether its terms and provisions are so uncertain as to render it void in law."

The argument made against the validity of the will is, that the trust is void because nothing was given to any particular church or society or the trustee of any institution, but the trustee can do as he may think fit in the execution of the trust, and may withhold from one denomination and give any amount of the fund to a particular church or denomination, at his pleasure.

The will creates a charitable trust. (*Crerar v. Williams*, 145 Ill. 625; *Hoeffer v. Clogon*, 171 id. 462.) Such trusts are distinguished from other trusts in important particulars,

and in this State they are never held to be void on account of any uncertainty as to the persons or objects to which they are to be applied, if there be some one appointed by the will to make the selection and render such persons or objects certain. A bequest for charity will be sustained and enforced although the objects of the charity are indefinite and uncertain and much is left to the discretion of the trustee in the application of the testator's bounty to the intended objects. (Pomeroy's Eq. Jur. sec. 1025.) Under the rules governing such trusts, a bequest for a school district, to be administered by a trustee for school purposes and for the poor of a certain county, has been sustained. (*Heuser v. Harris*, 42 Ill. 425.) Also, a trust for the worthy poor of a certain city, the income to be distributed annually in such manner as a court of chancery might direct, (*Hunt v. Fowler*, 121 Ill. 269,) and a trust for the widows and home and school for orphans of the deceased members of the Brotherhood of Locomotive Engineers, under such rules and regulations as shall be provided by the brotherhood. (*Guilfoil v. Arthur*, 158 Ill. 600.) It was the will of Silas W. Powell that his executor should select, from among prescribed religious bodies and within certain territorial limits, the objects of his bounty. To provide for the choice of the executor in that matter and vesting such discretionary power was a part of his plan. There is no power in the executor and trustee to divert any portion of the property or fund from charity, but only a power of selection of the denominations and places where the trust shall be applied. The will created a public charitable trust which is valid, and the bill was properly dismissed.

The decree of the circuit court is affirmed.

*Decree affirmed.*

## THE BREWER &amp; HOFMANN BREWING COMPANY

v.

GEORGE HERMANN.

*Opinion filed October 19, 1900.*

**APPEALS AND ERRORS**—*when objection that jury was not sworn comes too late.* An objection that among the jurors who signed and returned the verdict were certain names not contained in the panel as sworn, should be raised in the trial court and cannot be first raised on appeal.

*Brewer & Hofmann Brewing Co. v. Hermann*, 88 Ill. App. 285, affirmed.

**APPEAL** from the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. SAMUEL C. STOUGH, Judge, presiding.

EDWARD MAHER, and ROBERT F. KOLB, for appellant.

RUNYAN & RUNYAN, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

This is an appeal from a judgment of the Appellate Court affirming a judgment of the superior court of Cook county in favor of appellee, against appellant, upon two promissory notes, reading as follows:

"\$2000.

CHICAGO, ILL., *August 28, 1896.*

"Sixty days (60) after date we promise to pay to the order of George Hermann \$2000, at 43 So. Green, value received, with interest at six per cent per annum.

BREWER & HOFMANN BREWING CO.

H. C. McDONALD, *Secretary.*"

"\$1850.

CHICAGO, ILL., *September 23, 1896.*

"Thirty days (30) after date we promise to pay to the order of Geo. Hermann \$1850, at 43 So. Green, value received, with interest at the rate of six per cent per annum.

BREWER & HOFMANN BREWING CO.

H. C. McDONALD, *Secretary.*"

The declaration contained two special counts (one on each note) and the common counts. The defendant ob-



jected on the trial to the admission of the notes in evidence because of a variance between them and the notes as described in the special counts, and excepted to the decision of the court overruling the objection. It is not material to consider whether there was a variance or not, inasmuch as it was proved that the notes in question were given to the plaintiff by the appellant for money borrowed of him, and they were admissible under the common counts.

The next point made is, that the jurors were not sworn to try the case,—that is, that among the jurors who signed and returned the verdict were certain names not contained in the panel as sworn. There may be some difference between some of the christian names as signed to the verdict and those as written in the clerk's record, arising, doubtless, from the use of initials and middle names; but as the question attempted to be raised here was not preserved by the bill of exceptions, the record as written up by the clerk is conclusive. Besides, the question cannot be raised here for the first time. If there was anything in it worthy of notice it should have been called to the attention of the court below, which was not done.

We are unable to see that appellant had, or has, any defense whatever to the collection of these notes, and are of the opinion that this appeal was taken and prosecuted for delay.

The judgment will be affirmed, and in addition a judgment for damages under the statute will be entered in this court against appellant and in favor of appellee, as prayed by him, for \$200, which is less than six per cent of the judgment appealed from, and also for costs.

*Judgment affirmed.*

FRANK E. AYERS, County Treasurer,

v.

THE CHICAGO TITLE AND TRUST COMPANY, Exr. et al.

*Opinion filed October 19, 1900.*

1. **INHERITANCE TAX**—*appraisalment of estate in remainder is to be made upon testator's death.* The appraisalment of an estate in remainder, provided for by section 2 of the Inheritance Tax law, (Laws of 1895, p. 303,) is to be made immediately after the death of the testator, and not after the death of the life tenant.

2. **SAME**—*estates in expectation are subject to inheritance tax.* Under section 1 of the Inheritance Tax law of 1895 "expectant estates" or "estates in expectation" are subject to tax.

3. **SAME**—*Inheritance Tax law of 1895 construed.* Life estates or for a term of years, which are specifically enumerated in section 2 of the Inheritance Tax law, are the only estates not subject to tax; and this exemption is dependent upon the further requirement that the remainder shall be to the collateral heirs of the decedent, or to a stranger in blood or to a body politic or corporate.

4. **SAME**—*tax on remainder is due and payable upon testator's death.* Under the provisions of the Inheritance Tax law the tax on a remainder, whether vested or contingent, is due and payable upon the death of the testator, unless the remainder-man elects to defer payment by giving bond, as is provided in section 2 of the act.

5. **SAME**—*correct practice in appraising estate under Inheritance Tax law.* It is the duty of the court to fix the cash value of all estates, annuities, life estates or for a term of years, and the tax to which they are liable; and hence the appraisalment should show the value of the estate received by each residuary legatee under the will, after deducting the value of all gifts and legacies preceding the residuary clause.

6. **REMAINDERS**—*remainder-men may exist as a class without reference to individuals.* Those persons who would inherit, under the laws of descent, at the death of the life tenant or at the expiration of an estate for years constitute a class of remainder-men, notwithstanding the individuals who compose the class may be uncertain.

7. **SAME**—*when remainders are considered as vested.* Remainders which are left to persons, not by name but to be determined by the statutes of descent, or to a class, are considered as vested.

APPEAL from the County Court of DuPage county;  
the Hon. JOHN H. BATTEN, Judge, presiding.

187	42
e189	482
f189	484
e189	484
e189	485

187	42
f192	108

187	42
c208	445

Arthur C. Ducat died January 29, 1896, in DuPage county, Illinois, testate, and his will was admitted to probate February 4, 1896. By the first clause of the will he directed the payment of his debts and funeral expenses, together with the costs and expenses of administration of the trusts therein expressed. By the second clause \$25 was left to each of his children and to his sister, to be used in purchasing some article to be selected by each, etc. By the third clause he gave to his wife the library, pictures, papers, portraits, household furniture, horses, carriages, harness, live stock, plate and tableware, etc. By the fourth clause he gave his son Reginald his watch, wardrobe, guns, etc. By the fifth clause he gave his son Arthur C. \$10,000. By the sixth clause he gave the Chicago Title and Trust Company \$15,000, to be invested and the net income thereof paid to his daughter, Kate Alice Stivers, or to her children, until the termination of the trust mentioned in clause 9 of his will. The seventh clause of his will is as follows:

*"Seventh*—All the rest, residue and remainder of the estate, real, personal and mixed, of every kind and nature and wherever situate, which I shall leave at my decease, I do hereby devise and bequeath unto said Chicago Title and Trust Company, in trust, however, for the uses and purposes following, that is to say: To retain in kind, in whole or in part, as Charles F. Grey, George M. Lyon and George L. Paddock, hereinafter named, or either of them, may from time to time determine and advise my said trustee, all my articles of personal property not herein specifically disposed of or belonging to my premises at Downer's Grove, Lake Geneva or other places, which I shall leave at my decease, for the equal benefit and use of my now minor children, Mary, Reginald, Elizabeth, Alice Edith, Aileen Gladys, and my wife, Alice Jane Ducat, and any child hereafter born to me, in trust to manage all said trust estate, in order to keep the same as productive as may be, and from time to time to

sell, convey or convert into money or purchase money first mortgages, any or all of my real estate, in such manner and upon such terms as to my said trustees shall seem best; and in further trust to sell and convert into money such of my bonds, stocks, securities or other personal property or effects as the best interests of my estate may seem to my said trustees to require, without obligation on the part of any purchaser, whether of realty or personalty, to see to the application of purchase money; and in further trust and with further power from time to time to invest, re-invest and keep invested, by means of purchases, loans with adequate security, exchange or otherwise, the proceeds and avails of such real and personal estate or conversions thereof, so as to produce the best and safest income, such trust and holdings in trust to continue until the time hereinafter appointed for the division of my estate, and in the meantime, and during all the period of such trust, to pay the proper and lawful taxes and assessments on my estate, and to keep all buildings and other destructible property belonging to said trust properly insured against fire, lightning and tornadoes, in good and solvent companies, collect the aforesaid fire insurance and invest the same as directed for other money and personal property, according to the trusts herein expressed; and upon the further trust to hold my said estate in the name above mentioned for income and accumulation until the death of my said wife, Alice Jane Ducat, and all my following named children, viz.: Mary Ducat, Reginald Ducat, Elizabeth Ducat, Alice Edith Ducat and Aileen Gladys Ducat, and any other child or children that may be born to me before or after my death. In the meantime, and until the lapsing of all said lives, to divide and distribute equally among my said children last named and described, and my said wife, the net income of said trust fund, with full power to my said wife to expend the portion of any minor child, or such part as shall seem necessary, for the use, benefit,

support and education of such minor, and her receipt to my trustee shall be a sufficient voucher therefor, the use and benefit of such income to go to and be enjoyed by the survivors of my said wife and my children last above named and described: *Provided*, that where such non-survivors leave children or descendants of children, such income shall go to such children or descendants by representation of the share of the deceased parent, so that my said wife, the said children in this section named, and their descendants, enjoy such income until the closing of the trusts in this will expressed."

The eighth clause directs his trustee to use and expend from the income of his estate, and not from the capital unless necessary, such semi-annual sums as will suffice for the reasonable support of his wife and his then minor children and for any child thereafter born, and for their education. The ninth clause is as follows:

"*Ninth*—Upon the decease of my said wife, Alice Jane Ducat, and all of my said children above named and described, Mary Ducat, Reginald Ducat, Elizabeth Ducat, Alice Edith Ducat, Aileen Gladys Ducat, and any other child or children born to me hereafter, it is further my will that said trust fund, or so much as shall remain, shall go and by my said trustee be set apart and divided according to the mode of distribution now in force by the statute of Illinois in case of intestate estates, to such persons as could be entitled in such case."

The tenth clause makes the Chicago Title and Trust Company executor, with the Northern Trust Company of Chicago successor in trust. The eleventh clause provides that as long as Charles F. Grey, George M. Lyon and George L. Paddock, or any of them, shall live in Cook county, no sale or purchase of any real estate or loan of trust funds shall be made without the approval of one or more of those three persons. The twelfth clause appoints his wife, Alice Jane, guardian of the persons and education of his minor children, giving her power of substitu-

tion. The thirteenth clause directs that all provisions in favor of his wife, Alice Jane, are to be taken as additions to matters stipulated in her favor in an ante-nuptial contract. By the ante-nuptial contract he bound himself, his heirs, executors and administrators, to pay to Alice Jane Sutter, who subsequently became his wife, the sum of \$25,000 in full of dower, homestead and other rights.

The Chicago Title and Trust Company was appointed executor February 4, 1896, and on May 4, 1896, filed its inventory of the real and personal estate of the deceased. An additional inventory of personal property was filed on October 31, 1897. The two inventories show the value of the personal property to be \$330,464.07. The value of the real estate is not given.

On May 20, 1898, the county treasurer of DuPage county filed in the county court a petition, with a copy of the will and inventory attached, stating the above facts, and praying that an appraiser be appointed and such other proceedings may be taken for the ascertainment and collection of the amount to be collected under the Inheritance Tax law, etc. To that petition a general demurrer was filed on behalf of the Chicago Title and Trust Company and Alice Jane Ducat, and on June 10, 1899, an order was entered finding "that no tax is due or payable out of said estate at present, nor will be until the death of all the following named beneficiaries in the will of said Arthur C. Ducat in said petition mentioned, viz., Alice Jane Ducat, Mary Ducat, Reginald Ducat, Elizabeth Ducat and Alice Edith Ducat, but that the estate of said Arthur C. Ducat should by law be now appraised under the act aforesaid; and the court finds also that said demurrer of said Chicago Title and Trust Company to said petition is not well taken, but the demurrer of said Alice Jane Ducat to said petition is well taken, wherefore the said demurrer of said Chicago Title and Trust Company is now overruled and said demurrer of said Alice Jane Ducat is sustained and said petition is now dismissed as

to her, said Alice Jane Ducat; and said other defendant not further answering said petition, the court further orders that James T. Hosford, of the village of West Chicago, in said county, be and he hereby is appointed appraiser to appraise said estate, and he is further directed to give at least ten days' notice by mail of the time and place of making said appraisement and taking testimony in said matter by said appraiser, which notice shall be given and mailed to each of the following persons, to-wit: Chicago Title and Trust Company, a corporation, 100 Washington street, Chicago, Illinois; Alice Jane Ducat, Evanston, Illinois; Kate A. Stiver, of Ripon, Wisconsin; Capt. Arthur C. Ducat, of U. S. A., Salt Lake City, Utah; Mary Ducat, Reginald Ducat, Elizabeth Ducat and Alice Edith Ducat, children of the deceased, residing at Evanston, Illinois,—said persons being the persons claiming some interest in and to said estate. Said appraiser is further directed to appraise the estate, both personal and real, of said deceased as of the time of his decease, at a fair market value thereof, and to take the testimony of such witnesses as the said appraiser shall deem necessary, having knowledge of the value of said estate, and to report said testimony of said witnesses to this court. The said appraiser is further directed to report to this court his finding of the value of said estate, both personal and real, and that said matter be reported to this court for further order; and also that said appraiser give notice in writing, by mail, to said defendants of the time at which said report is to be filed by him, at least five days before filing the same."

On September 30, 1899, the appraiser appointed by the court filed in the clerk's office his report in writing, together with evidence taken by him as such appraiser, and notices given of the order of court, by which appraisement the real estate of the deceased was valued at \$33,131.50 and the personal property at \$333,118.57, making the total value of the real and personal property

\$366,250.07. On the same day the following order was entered of record by the county court:

"Now on this day comes the county treasurer, by M. Slusser, State's attorney of said county, and also come the Chicago Title and Trust Company, executor, etc., *et al.*, by George L. Paddock, its attorney, and comes also J. T. Hosford, appraiser, heretofore appointed to fix the cash value of the said estate, and files his report herein, and said report coming on for hearing upon the same and the objections of the said Chicago Title and Trust Company, executor and trustee, *et al.*, thereto, and the court being fully advised in the premises, doth order, adjudge and decree that said report be and the same is hereby in all things approved and confirmed, to which order of the court the said Chicago Title and Trust Company, executor and trustee, by its attorney, then and there excepts. And thereupon comes the said county treasurer, by his attorney, and moves the court herewith to fix the cash value of all estates, annuities and life estates or terms for years growing out of the said estate or created under the provisions of the last will and testament of the said deceased, and further to forthwith fix the tax to which the same are liable, as provided in an act of the General Assembly of the State of Illinois entitled 'An act to tax gifts, legacies and inheritances in certain cases and to provide for the collection of the same,' approved June 15, 1895, and in force July 1, 1895. And said motion coming on for hearing, and the court being fully advised in the premises, doth order, adjudge and decree that the said motion be and the same is hereby overruled. To the overruling of which said motion the said county treasurer, by his said attorney, then and there excepted, and prays an appeal to the Supreme Court of the State of Illinois, which is granted, and the said county treasurer is hereby given sixty days within which to present and have signed and sealed his bill of exceptions herein. And by agreement of all parties hereto it is ordered that this



appeal be consolidated with the one prayed in this case on the tenth day of June, A. D. 1899, and the same may be taken up upon one record."

E. C. AKIN, Attorney General, (C. A. HILL, of counsel,) for appellant.

PADDOCK, WRIGHT & BILLINGS, (GEORGE L. PADDOCK, and PENCE & CARPENTER, of counsel,) for appellees:

The remainders to be distributed by a trustee in the future, at the lapsing of the life tenancies, are not presently appraisable or taxable. Their appraisal and taxation are impossible in the nature of things.

The inheritance tax is not a tax upon property, but a tax upon the right to succeed to property. *Kochersperger v. Drake*, 167 Ill. 122; *Magoun case*, 170 U. S. 283.

Where time of distribution is made descriptive of the class which is to take, the gift will not vest in interest until the time so fixed for payment or distribution has arrived. *Haward v. Peavey*, 128 Ill. 440; *McCartney v. Osburn*, 118 id. 420.

While the tax is not a tax upon property, it is essential that there be a succession to property. Property must pass. Inheritance Tax law, secs. 1, 2.

The word "or," in section 2 of the Inheritance Tax act, is deliberately used in its primary and usual sense, as a distributive or separating word. To strike it out and insert "with" or "and," as proposed, is, therefore, to use "or" as a conjunctive or joining word. The effect of this construction is to defeat the obvious and expressed legislative policy to discriminate by exemption in favor of all mothers, all fathers, all husbands, all wives, all brothers and sisters, all sons of widows, all lineal descendants, devisees for life or years, and narrow down the favor of exemption from tax to some mothers, some fathers, some husbands, etc. This not only divides the class of mothers, fathers, devisees, etc., into a sub-class

of favorites and a sub-class of non-favorites, but bases that discrimination upon the wholly accidental feature of the nature of the "remainder."

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

The question presented on this record involves the construction of certain provisions of the Inheritance Tax law of this State, approved June 15, 1895, in force July 1, 1895. By section 1 of that act all property, real, personal and mixed, which shall pass by will or by the intestate laws of this State from any person who may die seized or possessed of the same while a resident of this State, shall be and is subject to a tax at a rate thereafter specified, and all heirs, legatees, devisees, administrators, executors and trustees are made liable for any and all such taxes until the same shall have been paid. The same section provides that when the beneficial interests to any property or income therefrom shall pass to or for the use of any father, mother, husband, wife or child, the rate of tax shall be one dollar on every \$100, provided that any estate which may be valued at a less sum than \$20,000 shall not be subject to any such duty or taxes. The second section of the statute is as follows:

"Sec. 2. When any person shall bequeath or devise any property or interest therein or income therefrom to mother, father, husband, wife, brother and sister, the widow of the son, or a lineal descendant during the life or for a term of years or remainder to the collateral heir of the decedent, or to the stranger in blood or to the body politic or corporate at their decease, or on the expiration of such term, the said life estate or estates for a term of years shall not be subject to any tax and the property so passing shall be appraised immediately after the death at what was the fair market value thereof at the time of the death of the decedent in the manner hereinafter provided, and after deducting therefrom the value of said

life estate, or term of years, the tax transcribed by this act on the remainder shall be immediately due and payable to the treasurer of the proper county, and, together with the interests thereon, shall be and remain a lien on said property until the same is paid: *Provided*, that the person or persons or body politic or corporate beneficially interested in the property chargeable with said tax elect not to pay the same until they shall come into the actual possession or enjoyment of such property, or, in that case said person or persons or body politic or corporate shall give a bond to the People of the State of Illinois in the penalty three times the amount of the tax arising upon such estate with such sureties as the county judge may approve, conditioned for the payment of the said tax, and interest thereon, at such time or period as they or their representatives may come into the actual possession or enjoyment of said property, which bond shall be filed in the office of the county clerk of the proper county: *Provided, further*, that such person shall make a full, verified return of said property to said county judge, and file the same in his office within one year from the death of the decedent, and within that period enter into such securities and renew the same for five years."

Under the seventh clause of the will the beneficial interest in and to the property therein described, as well as the income therefrom, passed to the Chicago Title and Trust Company, and so much as might be necessary might be used for the use of the wife and children of the deceased in their support, maintenance and education. The effect of section 1 of the act, imposing a tax upon any property passing by will or by the intestate laws, is sufficient to include property devised whereby an estate for life is created, unless the subsequent sections of the act limit the power of taxation on such devise. An exception is made by section 2 of the act, of a character to exclude from liability to a tax under the act life estates or their value. That section provides that when a be-

quest or devise of property, or interest therein or income therefrom, is made to a mother, father, husband, wife, brother or sister, or widow of a son or a lineal descendant, during life or for a term of years, with remainder to the collateral heirs of the deceased, or to a stranger in blood, or to a body politic or corporate, the life estate shall not be subject to any tax. By the will in this case the devise was made of a life estate in the income for the benefit of the wife and children mentioned in the will, and upon the death of the beneficiaries of the income for life the remainder is to descend under the inheritance laws of the State of Illinois, and necessarily goes to the children of the testator's children or their descendants, or to his heirs. Where such a result follows under and by virtue of the will, it is clear that section 2 does not exempt such remainder from liability to a tax, but by the express provisions of that section the appraisal is to be made and the tax to be assessed on the death of the testator, and by the provisions of section 1 it is made payable on his death.

By section 2 it is provided that if the remainder is to the collateral heir of the decedent, or to a stranger in blood, or to a body politic or corporate, on the decease of the life tenant or the end of the life estate the life estate or estate for a term of years shall not be subject to any tax, "and the property so passing shall be appraised immediately after the death at what was the fair market value thereof at the time of the death of the decedent in the manner hereinafter provided, and after deducting therefrom the value of said life estate, or term of years, the tax transcribed by this act on the remainder shall be immediately due and payable," etc. The appraisal that is to be made immediately after death, mentioned in the foregoing quotation from that section, refers to the death of the testator and not to the death of the life tenant. If it referred to the death of the life tenant then there could be no deduction of the value of the life estate, for

such estate would be at an end and the gross sum would be in existence as liable to the tax. By this provision the tax on the remainder, whether vested or contingent, is immediately due and payable unless the holder of that remainder is in being, capable of acting, and elects not to pay the same until he comes into the actual enjoyment and possession of the property, in which case he must give bond for the payment thereof, with interest thereon at six per cent, renewable as specified in section 2. In the case now before the court there is no person in existence who could execute a bond or who could make an election to pay the same when he comes into actual enjoyment and possession of the property as a remainder-man, and hence the tax becomes immediately due and payable.

Where the remainder is actually vested in a person capable of making an election, and consequently capable of executing a bond, to be renewed as directed by the statute, the payment of the amount of tax, with six per cent interest annually, may be deferred in the manner provided by section 2. The statute contemplates the taxation of such interests as are capable of valuation at the death of the decedent because of the right of a person to inherit or the right to succeed under a will, and every interest, immediate or future, thus derived is liable to pay for such right of succession unless excepted by the act. Where a devise or bequest of a remainder works a vested though defeasible interest on the death of the testator, notwithstanding possession does not pass until the death of the life tenant, the transfer or succession takes place at the death of the testator and the remainder-men may be designated as a class. The individuals of the class may be uncertain, but the class itself is certain, and by the provisions of this will those who are surviving the life tenant, or surviving those who are entitled to the income for life, are designated as a class as those who would inherit under the laws of the State of Illinois, and the class exists without reference to the individuals who

compose it. In ascertaining the value of the estate in remainder the value of the life estate should be deducted, which can be determined by the use of the life tables.

We hold that the right to succession, under a will, to an estate in remainder is liable to be taxed, the valuation to be made as of the date of the death of the testator, and the value to be taken of the estate of the decedent less the value of the life estate, and where the remaindermen do not or cannot make an election, as provided by section 2, the tax must be paid in accordance with the provisions of that section. We further hold that where, as under the provisions of the will in this case, there is no provision for the remainder going to collateral relatives, a stranger to the blood or to a corporation, there is no one to make an election and the tax on the remainder becomes due. Section 3 of the act provides that all taxes imposed by the act, unless otherwise provided, shall be due and payable at the death of the decedent, and interest at the rate of six per cent per annum shall be collected thereon for such time as the tax is not paid. The only provisions with reference to "unless otherwise provided therein" are the provisions of section 2 with reference to collateral heirs, strangers to the blood and a corporation, extending the time for payment of the tax by executing bonds with security.

We are of opinion that the county court erred in entering its order, and its judgment is reversed and the cause remanded for further proceedings in accordance with what is herein said.

*Reversed and remanded.*

Upon the rehearing the following additional opinion was delivered:

Per CURIAM: We granted a rehearing in this case in order to give further consideration to the questions involved, and, after doing so, adhere to the views expressed in the opinion delivered upon the first hearing, and to the conclusion there reached.

Two questions are suggested by the record, and by the briefs of counsel. The first is: are the distributees, named in the seventh paragraph of the will, being the wife and five of the seven surviving children of the testator, now chargeable with a tax, or are they exempt under the act; and the second is: are the shares of the distributees, who are described as a class in the ninth paragraph, now chargeable with a tax, or must taxation be deferred until these distributees are individually identified, and the amount of their several separate estates and exemptions is ascertained by the future event?

*First*—It is contended by counsel for appellees, that section 2 of the act comprehends and exempts not only all legatees and devisees for life or years of the classes of kinship therein described, but also all other legatees and devisees for life and years whatever the class of their kinship may be, where the remainder is to a collateral heir, or stranger in blood, or to a body politic or corporate. We are not inclined to adopt this construction. Such a construction would virtually exempt from taxation all life estates and estates for years.

Section 2 of the act uses the following words: "Or remainder to the collateral heir of the decedent, or to the stranger in blood or to the body politic or corporate at their decease, or on the expiration of such term, the said life estate or estates for a term of years shall not be subject to any tax," etc. The words, "at their decease," refer back to the first clause of section 2, and the word, "their," refers to the persons or classes mentioned in that clause. In other words, the remainder referred to is a remainder at the decease of "mother, father, husband, wife, brother and sister, the widow of the son or a lineal descendant." Clearly, the words "at their decease or on the expiration of such term," can have no other reference than to the termination of the estate for life, or for a term of years, of the mother, father, husband, wife, brother and sister, widow of the son, or lineal descendant, men-

tioned in the first clause of the section. The estates of those particular persons or classes is also indicated by the words "the said life estate or estates for a term of years." If this be so, then the word "or" before the word "remainder" can have no other meaning than "and." It is well settled, that the words "or" and "and" will not have their literal meaning, when to give them their literal meaning renders the sense of a statutory enactment dubious. Their strict meaning is more readily departed from than that of other words, and one will be read in the place of the other where the meaning of the context requires it. (Sutherland on Statutory Construction, sec. 252.) Where it is necessary to effectuate the intention of the legislature, the word "and" is sometimes considered to mean "or," and the word "or" to mean "and." (2 Am. & Eng. Ency. of Law,—2d ed.—p. 333; *Boyles v. McMurphy*, 55 Ill. 236.) It follows, that the life estate, or estate for a term of years, referred to in section 2, is only exempt from the inheritance tax when the remainder, following upon the expiration of such estate, is to the collateral heir of the decedent, or to the stranger in blood, or to the body politic or corporate. As there is no such remainder under the provisions of the will of Arthur C. Ducat, deceased, the life estates of the distributees, named in the seventh paragraph of the will, are not exempt from the tax.

Section 1 of the act imposes the tax, and its first clause provides that "all property, real, personal and mixed which shall pass by will or by the intestate laws of this State from any person who may die seized or possessed of the same while a resident of this State \* \* \* shall be and is subject to a tax at the rate hereinafter specified to be paid to the treasurer of the proper county for the use of the State; and all heirs, legatees and devisees, administrators, executors and trustees shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed." Section 1 then



proceeds further to provide that "when the beneficial interests to any property or income therefrom shall pass to or for the use of any father, mother, husband, wife, child, brother, sister, wife or widow of the son, \* \* \* in every such case the rate of tax shall be one dollar on every hundred dollars of the clear market value of such property received by each person and at and after the same rate for every less amount, provided that any estate which may be valued at a less sum than \$20,000 shall not be subject to any such duty or taxes, and the tax is to be levied in above cases only upon the excess of \$20,000 received by each person." By the terms of the seventh clause of the will now under consideration, the beneficial interest in and to the property there described, as well as the income therefrom, passed to the Chicago Title and Trust Company for the use of the wife and children of such deceased testator; and, therefore, the life estates therein described are brought within the taxing power of the first section of the Inheritance Tax law. That section reaches all interests, incomes and expectancies, except the life estates and terms of years referred to in section 2 of the act. That is to say, where the remainder goes to the collateral heir of the decedent, or to the stranger in blood, or to the body politic or corporate, the life estate or estate for years, upon which the remainder is dependent, is not taxable, but the tax on such remainder, whether vested or contingent, is immediately due and payable, unless the holder thereof elects not to pay the same until he comes into the actual enjoyment and possession of the property, and, in that case, he must give bond for the payment thereof, and for interest thereon at six per cent.

So far as the constitutionality of the act and of its various provisions is concerned, we decline to consider that question, as the constitutionality of the act has been settled by this court in the case of *Kochersperger v. Drake*, 167 Ill. 122, and by the Supreme Court of the United

States in the case of *Magoun v. Illinois Trust and Savings Bank*, 170 U. S. 283. Moreover, the question of the constitutionality of the act is not presented by the record, as no errors or cross-errors are assigned, which attack the constitutionality of the Inheritance Tax law, or any part thereof, either under the State constitution or under the Federal constitution.

*Second*—It is furthermore contended by counsel for appellees, that the remainders, provided for by the ninth clause of the will here under consideration, are not now taxable, and that the tax cannot be fixed until the estates of the life tenants shall be terminated. We cannot concur in this contention.

Section 1 of the act provides, that "all property, real, personal and mixed which shall pass by will or by the intestate laws of this State from any person who may die seized or possessed of the same while a resident of this State \* \* \* to any person or persons or to any body politic or corporate in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled in possession or expectation to any property or income thereof, shall be and is subject to a tax," etc. Bouvier, in his Law Dictionary, defines an estate in expectancy as follows: "An estate giving a present or vested contingent right of future enjoyment; one in which the right to pernanacy of the profits is postponed to some future period. Such are estates in remainder and reversion." (Vol. 1, p. 693.) Anderson, in his Dictionary of Law, (p. 434) defines an expectancy as "an estate in remainder or a reversion." Black, in his Law Dictionary, (p. 460) defines "Expectancy" as follows: "The condition of being referred to a future time, or of dependence upon an expected event; contingency as to possession or enjoyment. With respect to the time of their enjoyment estates may be either in possession or expectancy; and of expectancies there are two sorts—one created by the act of the parties, called

'a remainder;' the other by act of law, called a 'reversion.'" He also defines "Expectant Estates" as follows: "Interests to come into possession and to be enjoyed *in futuro*. They are of two sorts at common law—reversions and remainders." Nothing is clearer than that, under section 1, "expectant estates" or "estates in expectation" are subject to tax. In view of the definitions of expectant estates above given, it is clear that the remainders, provided for in the will of Arthur C. Ducat, deceased, are estates in expectancy or expectation within the meaning of the statute; and, as such, they are subject to the inheritance tax provided for in section 1. The conclusion here announced is confirmed by the other provisions of the act. Section 2 exempts certain life estates and estates for years from taxation, but expressly provides for the levy of a tax upon the remainders dependent on such life estates or estates for years; and further provides that the tax on such remainders shall be immediately due and payable, and shall be a lien upon the property until the same is paid; but also provides that the persons chargeable with such tax may, if they so elect, give bond for the payment thereof when they come into the actual possession or enjoyment of the property. Section 3 makes all taxes imposed by the act due and payable at the death of the decedent, "unless otherwise provided for," and there is no other provision postponing such payment except that contained in section 2. From the language of sections 4, 5, 22 and other provisions of the statute, it seems to have been the intention of the legislature, that all estates subject to tax under the act shall be appraised and valued, and the tax thereon fixed, promptly upon the death of the testator or intestate, or within a reasonable time thereafter. Whether or not the remainders provided for in the present will are or may be considered vested or contingent is not altogether material, for they are "expectancies" within the meaning of the statute, and are presently taxable as such.

We see no reason why the county judge cannot ascertain the value of the estate which passed to the Chicago Title and Trust Company, as trustee, under the present will, and, after deducting the debts, legacies, costs of administration and compensation of trustees, fix the tax for which the trustee under the statute is liable.

If it were important to settle the technical question whether the remainders are vested or contingent, the balance of the argument is in favor of holding them to be vested. The remainders, dependent upon the life estates provided for in the will, or so much of the trust fund as shall remain at the death of the life tenants, "shall go and by my said trustee be set apart and divided according to the mode of distribution now in force by the statute of Illinois in case of intestate estates to such persons as could be entitled in such case." The class, who are to take as remainder-men upon the termination of the life estates, is fixed and determined by the will itself, but the time of enjoyment or possession only is postponed, and hence the remainders here must be regarded as vested remainders. In construing wills, a remainder will be held to be vested unless a contrary intention on the part of the testator is clearly manifested, and the law always gives a preference to vested remainders over contingent remainders. (*Scotfield v. Olcott*, 120 Ill. 362; *Kellett v. Shepard*, 139 id. 433; *Ducker v. Burnham*, 146 id. 9; *Grimmer v. Friederich*, 164 id. 245; *McCartney v. Osburn*, 118 id. 403; *Harvard College v. Balch*, 171 id. 275.) Under these authorities when remainders are left to persons, not by name, but to be determined by the statutes of descent, or to a class as in the will in the case at bar, they are considered as vested remainders.

For the reasons above stated, we are still of the opinion that the remainders provided for by the ninth clause of the will here are now taxable.

We do not deem it necessary to review the New York decisions referred to by counsel for appellees. A careful

examination of those decisions, and of the inheritance laws of New York, will show differences which make them inapplicable for the most part to cases arising under the statute of this State. One of the main differences between the Illinois act and the New York act is, that the former taxes all successions, except the life estates and terms for years mentioned in section 2 above quoted, while the latter taxes only successions to collaterals, or strangers in blood.

*Third*—Some of the errors assigned attack the appraisement made by or under the direction of the county judge, because it simply values the entire estate of the deceased, and fails to ascertain the value of the estate received by each person. The cash value of all estates, annuities and life estates or for terms of years, and the tax to which the same is liable, should be fixed by the county judge. The county judge erred here in approving the report made by the appraiser, inasmuch as the appraisement therein made was not of the character thus indicated. The report as made furnishes no legal basis for fixing the cash value of the estates received by the wife and children, nor for fixing the tax to which the same is liable. The appraiser should show the value of the estate received by each residuary legatee under the will, and, in doing so, should deduct the gifts and legacies preceding the residuary clause of the will. No estimate was made and no notice taken in the report of these preceding gifts. The appraisement was made upon the basis of the entire value of the decedent's property at the time of his death, and not of the value of the estate received by each person under the will. Such an appraisement offers no proper basis for the levy of a tax under the Inheritance Tax law. We are, therefore, of the opinion that the county court erred in approving the report of the appraiser as made.

The former opinion filed herein is re-adopted, together with the additional suggestions herein set forth; and it

is ordered that said former opinion, together with the present opinion as an *addendum* thereto, be re-filed, and that the judgment of reversal heretofore entered herein be re-entered as the judgment of this court; and the cause is hereby remanded to the county court for further proceedings in accordance with what is said herein and in said former opinion.

*Reversed and remanded.*

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H. G. McPIKE *et al.*

*v.*

THE CITY OF ALTON.

*Opinion filed October 19, 1900.*

187	62
108a	880
108a	881

ORDINANCES—*when ordinance is repealed in toto by later one.* An ordinance for paving a certain street for seven designated blocks by a special tax upon private property, upon a uniform basis of frontage, must be regarded as repealed *in toto* by a later ordinance providing for paving the same street for six of such blocks upon a different plan, and further providing that the entire cost should be borne by a railroad company, which accepted the terms of the ordinance and complied therewith.

APPEAL from the County Court of Madison county;  
the Hon. WILLIAM P. EARLY, Judge, presiding.

JOHN F. MCGINNIS, for appellants.

HENRY S. BAKER, for appellee.

Mr. CHIEF JUSTICE BOGGS delivered the opinion of the court:

The appellant McPike is the owner of lots 37 and 38 in block 91, in the city of Alton, having a total combined frontage of ninety feet on Piasa street. The appellant Bowman, as trustee, holds title to a certain part of block 1, in said city, having a frontage of one hundred and

twenty-four feet on Front street, in said city. This is an appeal prosecuted by them to bring in review the judgment of the county court of Madison county confirming a special tax levied upon their property, respectively, upon the basis of front-foot assessments thereof under an ordinance adopted by the city of Alton on the 10th day of March, 1896, providing for paving and improving Piasa street, Market street, the city hall square, and Front street from Market to Ridge street, in the said city, the cost of said improvement to be assessed and collected upon lots, parts of lots and tracts of lands abutting upon the line of said streets so to be paved and improved, in proportion to the frontage thereof. This ordinance contemplated the paving of Front street (at different widths) a distance of seven squares.

On the 28th day of April, 1896, an estimate of the total cost of the proposed improvement was reported to and approved by the city council of the city. On the 12th day of May, 1896, the petition of the city was filed in the county court of the said county praying for the appointment of commissioners to assess the cost of such improvement in the manner prescribed by law. Under this petition commissioners were appointed and an assessment roll returned, assessing each lot or tract of land abutting on each of the said streets, including the property of these appellants, at the uniform rate of \$4.16 per front foot. At the September term, 1896, of the said county court, judgment by default was entered, confirming said assessment against all property as to which no objections were filed. Objections were filed by these appellants and other property owners, and the cause was continued pending the hearing of such objections. On the 10th day of November, 1896, and while said proceeding for the confirmation of said special tax was still pending against these appellants and others who had filed objections thereto, the city council of the said city of Alton adopted an ordinance for the paving of said

Front street from Alby to Ridge street, the full cost thereof to be paid by the Cleveland, Cincinnati, Chicago and St. Louis Railway Company. This ordinance granted said railway company certain privileges and facilities, and contained an agreement or covenant on the part of said railway company that said company would, at its own expense, pave the said Front street from Alby street to Ridge street in the manner provided for in the ordinance. The said railway company accepted the ordinance and at its own expense completed the work of paving said portion of Front street.

That portion of said Front street from Alby to Ridge street which the ordinance of November 10, 1896, provided should be paved at the cost and expense of the said railway company, and which was so paved, is the same portion of said Front street, for the length of six blocks or squares, which the ordinance of March 10, 1896, here sought to be enforced, provided should be paved at the expense of the owners of property abutting on said Front street, Piasa street, Market street and city hall square. The later of said ordinances, providing for the paving of said Front street in front of said six blocks, covered, for that distance, the same length of Front street as did the pavement ordered to be made by the former ordinance, but the later ordinance provided for a different width of pavement in front of some of the blocks, (an increased area of paving in front of some of them and a smaller area in front of others,) and provided for the paving of said Front street to a point five feet nearer the building line on the abutting property than did the former ordinance. Appellants contended said second ordinance operated to repeal the former ordinance *in toto*, and in the trial court asked for and obtained leave to present, and presented, that contention as a further objection to the rendition of judgment of confirmation against their property under the petition which, as before said, was pending against them in behalf of the city. Appellants also presented



other objections to the rendition of a judgment of confirmation, but all of their objections were overruled and judgment entered confirming the assessment roll and entering judgment against the property of said appellants in the amount shown on said assessment roll, being at the rate of \$4.16 per front foot of their respective properties.

We think the effect of the enactment of the ordinance of November 10, 1896, was to repeal the prior ordinance under which the proceedings culminating in these judgments were instituted and prosecuted, and therefore it is not necessary we should refer to other objections presented by the appellants.

The former ordinance, relied on to support these judgments, provided for the paving of Piasa street, Market street, city hall square, and Front street to the length of seven designated blocks, the total cost of the improvement to be levied upon the lots, parts of lots and tracts of lands abutting on said streets, in proportion to the frontage of such property. The latter ordinance provided for the paving of said Front street for six of the blocks covered by the first ordinance upon a materially different plan, and the cost thereof to be paid by the Cleveland, Cincinnati, Chicago and St. Louis Railway Company. The said railway company accepted the provisions of the ordinance and caused the street to be improved at its own expense, in accordance with the requirements of the city as expressed in the later ordinance. Clearly, the tax ordered to be collected from the private property owners should not be exacted. If exacted, the owners of property abutting upon the streets to be improved would be required to pay to the city the estimated cost of the paving of Front street for a distance of six blocks, notwithstanding the city had abandoned the proposed improvement in said portion of Front street and had caused such portion of said Front street to be paved under a later and entirely different ordinance, on a materially different plan and at the expense of said Cleveland, Cin-

cinnati, Chicago and St. Louis Railway Company. The improvement contemplated to be made by the first ordinance cannot be regarded otherwise than as an entirety. The frontage tax was levied upon that assumption. Neither the value of the lots abutting upon the streets to be improved, the cost of the improvement to be made in front of the lots nor the benefits to the respective parcels of property was the test of the amount required to be contributed by the respective properties, or the owners thereof, to the general fund to defray the cost of the improvement. The amount which the property of the appellants was condemned to pay by the judgment appealed from was the proportionate cost per front foot of the entire cost of the proposed improvement. The city council, as the first ordinance clearly indicates, regarded the entire improvement as equally beneficial to all the property abutting on the streets to be improved, but it by no means follows that the council would have regarded the improvement on the streets other than Front street as so beneficial, or would have adopted an ordinance providing for the improvement of such other streets, to be paid for by special taxation. Had the city council had under consideration the adoption of an ordinance for the improvement of Piasa street, Market street and city hall square, the benefit accruing to the abutting property might have been regarded as the proper test of the amount to be paid by such property. The ordinance of November 10, 1896, providing for the paving of said Front street, the costs to be defrayed by said railway company, therefore operated to repeal the ordinance of March 10, 1896, *in toto*, hence there is no foundation to support the judgments against the property of the appellants.

*Judgment reversed.*

CHARLES H. REQUA *et al.* Exrs.

v.

ALICE M. GRAHAM, Admx.

*Opinion filed October 19, 1900.*

187	67
f191	608

**CREDITORS' BILLS**—*husband's annuity is subject to claims of his creditors.* An annuity given by will in trust by the wife for her husband in lieu of all his interest in the estate is a mere offer to purchase his interest, which he is at liberty to accept or reject, and hence if he accepts the trust he takes it as a purchaser, and the same is not within the exception stated in section 49 of the Chancery act, relating to creditors' bills, (Rev. Stat. 1874, p. 204,) but is subject to the claims of his creditors notwithstanding the will expressly provides that it shall not be. (*Steib v. Whitehead*, 111 Ill. 247, explained.)

*Requa v. Graham*, 86 Ill. App. 566, affirmed.

**APPEAL** from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

This is a creditor's bill filed by Alice M. Graham, administratrix of the estate of James E. Graham, deceased, against Charles H. ReQua and Newton A. Partridge, executors of the last will and testament of Annie Elizabeth Nichols, deceased, and John F. Nichols, to subject an annuity given to John F. Nichols by the will of his wife, Annie Elizabeth Nichols, to the payment of a judgment against John F. Nichols.

The will of Annie Elizabeth Nichols, among other devises and bequests, bequeaths to her husband, John F. Nichols, "the annual sum of \$1800 during his natural life, to be paid quarterly, in equal installments of \$450 each, and deposited to his credit in the Merchants' Loan and Trust Company, or some other Chicago bank, subject to his order, which annuity shall be in lieu of all other interest in my estate to which he would be entitled." By codicil attached to said will it was further provided: "I have already advanced to my husband and expended

for his use so large an amount, and the probably net income of my estate will be so small, that I do not deem it just to burden my daughters, Catharine Wheaton Haven Ainley and Alice Haven ReQua, with so large an annuity for his benefit as is provided by said will, and I direct that the yearly or annual sum of \$1200 shall be paid to him in the same manner in said will provided for, which provision shall be in place and in lieu of all estate, claim, right and provision to which he is or may or would otherwise be entitled, either by virtue of the law or under the provisions for his benefit contained in my will." The will also makes a division of the real and personal property of the testatrix, and appoints Charles H. ReQua and Newton A. Partridge executors thereof. The estate consisted of real estate valued at \$37,500 and personal property valued at \$33,592.67.

It appears from the master's report that John F. Nichols is seventy years of age, is infirm in health, has no property or business and is physically incapable of following any occupation for a livelihood; that said annuity is the provision given by said testatrix out of her separate estate for the support and maintenance of said Nichols during his natural life, and that the whole of said annuity has been and is expended by him for his support and maintenance, and is only sufficient to support and maintain him in the manner of living to which he is and has been accustomed, and that said Nichols is lacking in business capacity, and said testatrix had taken her affairs out of his hands prior to her death.

The superior court decreed such annuity should be applied in payment of said judgment, which decree has been affirmed by the Appellate Court for the First District, and this appeal is prosecuted to reverse such judgment of affirmance.

PARTRIDGE & PARTRIDGE, (WALKER & PAYNE, of counsel,) for appellants.

B. W. ELLIS & SON, for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

It is contended by appellants that the provision made for John F. Nichols by the will of Mrs. Nichols is such that it is expressly excepted under the statute regarding creditors' bills, (Rev. Stat. chap. 22, sec. 49,) which provides, "except when such trust has, in good faith, been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself," and that appellee cannot reach the annuity in question by her bill.

In order to bring a case within the exception of the statute it is necessary that the trust fund proceed from some person other than the defendant himself. If the trust fund in this case proceeded from John F. Nichols himself it does not fall within the exception of the statute and is not protected. The annuity in question was a mere offer by Mrs. Nichols to her husband for the purchase of his interest in her estate. He was at liberty to accept or reject the same, and having accepted it, he took it as a purchaser and it is subject to the payment of his debts, the same as any other legacy. In the case of *Carper v. Crowl*, 149 Ill. 465, (on p. 479,) we say: "The provision made by the will was therefore in lieu of, and not in excess of, her rights in her husband's estate as widow, and she took the same, not as a beneficiary under the will, but as a purchaser." And in *Blatchford v. Newberry*, 99 Ill. 11, (on p. 62,) it is said: "A provision by will in lieu of dower is, in fact and in legal effect, a mere offer by the testator to purchase out the dower interest for the benefit of his estate." In *Isenhart v. Brown*, 1 Edw. Ch. 413, which is referred to and endorsed by the court in *Carper v. Crowl*, *supra*, the court, in speaking of a devise in lieu of dower, said: "It is the price put by the testator himself upon the right, and which she is at liberty to accept. Her relinquishment of dower forms a valuable consid-

eration for the testamentary gifts. In this point of view she becomes a purchaser of the property left to her by the will. So, on the other hand, the husband offers a price for his wife's legal right of dower, which he proposes to extinguish, and if she agrees to the terms she relinquishes it and is entitled to the price. It is therefore a matter of contract or convention between them, and what she thus becomes entitled to receive is not by way of bounty, like other general bequests, but as purchase money for what she relinquishes." In the case of *Bank of Commerce v. Chambers*, 96 Mo. 459, a husband who released his curtesy in his wife's estate, accepting in lieu thereof an income given him by her will, was regarded as a purchaser of such income and not a mere recipient of his wife's bounty, and the income was held subject to claims of his creditors, notwithstanding the provisions of the will exempting it from such claims. The court say: "He therefore occupies the attitude of a purchaser of that income, as much so as does a wife who receives a conveyance of land in consideration of her relinquishment of her dower in other property of her husband. \* \* \* Regarding, then, the defendant in the light of a purchaser of the income bestowed upon him by the will of his wife, and not as a mere recipient of her bounty, it must be ruled that such income is subject to the claims of his creditors."

Under these authorities it is clear the annuity in question was purchased by John F. Nichols and did not proceed as a bounty from Mrs. Nichols, and that the same is not within either the letter or the spirit of the exception contained in section 49 of the statute, and is therefore subject to the claims of his creditors and can be reached by a creditor's bill.

The case of *Steib v. Whitehead*, 111 Ill. 247, is relied upon by appellants as supporting their position. That case and kindred cases, as said in *Bank of Commerce v. Chambers*, *supra*, "rest in a large part upon the distinct ground

that a creditor is not defrauded and therefore has no cause of complaint, because the owner of property, in the free exercise of his will, so disposes of it that the object of his bounty, who parts with nothing in return, has a sufficient income provided for and applied to his life support." In this case John F. Nichols did part with something in return for said annuity. As husband of Annie Elizabeth Nichols he had one year after the probate of her will in which to determine whether he would take by inheritance under the law or take under her will. By failing to decline to take under the will he relinquished his rights to his share of her estate given him by law, and with such interest purchased the annuity, and now holds the same by virtue of such purchase and not as an object of her bounty. *Blatchford v. Newberry, supra; Carper v. Crowl, supra; Isenhardt v. Brown, supra.*

The provision of the statute above quoted and relied upon by appellants is taken from the New York statute (*Singer & Talcott Stone Co. v. Wheeler*, 6 Ill. App. 225; *Young v. Clapp*, 147 Ill. 176;) upon the same subject, which had before that time been construed by the New York courts. (*Clute v. Bool*, 9 Paige's Ch. 83; *DeGraw v. Clason*, 11 Paige, 136; *Hallett v. Thompson*, 5 Paige's Ch. 583.) Such being the case, the courts of this State will presumably be governed by such decisions. "In adopting the statute of another State, it is presumed the General Assembly intends that it shall receive the construction given it by the courts of the State from which it is adopted, unless such construction is inconsistent with the spirit and policy of our laws." (*Campbell v. Quinlin*, 3 Scam. 288; *Rigg v. Wilton*, 13 Ill. 15; *Streeter v. People*, 69 id. 595; *Gage v. Smith*, 79 id. 219.) And no such inconsistency being apparent in the present case, but the construction adopted by the New York courts being in harmony with the general current of authority and with that of our own court, so far as we have had occasion to pass upon the question, we are inclined to follow the decisions of that State.

In the case of *DeGraw v. Clason*, *supra*, the husband gave his wife, by will, an annuity for life or widowhood in lieu of dower. A creditor filed a bill to reach such annuity. The court sustained the bill, and the judge said: "I can see no ground whatever for considering this bequest as a trust, any more than in the case of an ordinary pecuniary legacy payable immediately, and charged upon the real estate as well as upon the personal estate of the testator generally." This case, in principle, is precisely like the case at bar and must control us in the decision thereof. The annuity in this case is to be deposited in the bank quarterly, to the credit of John F. Nichols, and is subject to his order. In the case of *Chute v. Bool*, *supra*, it is said, on page 86: "If the life interest of the defendant in the fund is of such a nature that he can sell and dispose of it or control it as he pleases, without restriction or limitation, then, according to the decision of this court in the case of *Hallett v. Thompson*, 5 Paige, 583, the whole annuity may be reached at once and applied to the payment of his debts, without reference to his present or future wants."

The annuity, as we have seen, was purchased and belongs to John F. Nichols, and under the authority of *Bank of Commerce v. Chambers*, *supra*, can be reached by his creditors, even though the will *expressly exempted it from their claims*.

From an examination of the abstract we agree with the court below that there was ample proof of the recovery and revival of the judgment which is the basis of this suit, and that it remains unpaid.

We find no reversible error in this record. The judgment of the Appellate Court will therefore be affirmed.

*Judgment affirmed.*



## THE PHENIX INSURANCE COMPANY

v.

F. H. CALDWELL.

*Opinion filed October 19, 1900.*

1. **INSURANCE**—*bond for deed is not a "sale."* The execution and delivery of a bond for deed, even though accompanied by part payment of the purchase money, is not a sale, within the meaning of an insurance policy requiring the consent of the company to any sale of the property, since the maker of the bond for deed retains both the legal and equitable title until the obligee has performed the conditions which entitle him to demand a conveyance.

2. **SAME**—*a provision restricting right of waiver may itself be waived.* A provision of an insurance policy that no agent of the company except its principal officers or general agent shall have power to waive or modify the conditions of the policy, may itself be waived by the language and conduct of agents having apparent power to bind the company.

3. **SAME**—*defense of change of possession must be specially pleaded.* An insurance company cannot avail of the defense of change of possession, in violation of the conditions of the policy, without specially pleading such defense and giving the plaintiff an opportunity to reply.

4. **SAME**—*effect of proof of change of possession not pleaded.* In an action on an insurance policy, if the defense of change of possession is not specially pleaded, the fact that proof of such change incidentally creeps in does not require the plaintiff to rebut it, nor entitle the defendant to claim the benefit and have the jury instructed as to the effect of a change of possession under the terms of the policy.

5. **TRIAL**—*when court is not bound to permit amendment.* The court is not bound, on the third day of the trial, to allow the defendant to amend its amended plea so as to charge a change of possession in violation of the terms of the insurance policy in suit, where no showing is made in support of the motion nor any excuse made for the delay in presenting the defense.

*Phenix Ins. Co. v. Caldwell*, 85 Ill. App. 104, affirmed.

**APPEAL** from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Rock Island county; the Hon. W. H. GEST, Judge, presiding.

187	78
96a	*529

187	78
197	*192

187	78
215	*802

A. E. DEMANGE, for appellant:

Not to allow a formal amendment to enable defendant to present his defense is abuse of discretion. *Shufeldt v. Bank*, 93 Ill. 597; *Drake v. Drake*, 83 id. 526; *Kirkpatrick v. Cooper*, 77 id. 565; *Insurance Co. v. Real Estate Trust Co.* 1 Ill. App. 391.

It was error to exclude appellant's offered proof of change of possession or occupancy. It was admissible under the general issue. In assumpsit, breaches of conditions in the policy itself, as, that the insured was the owner or in possession of the property or that it was unoccupied, may be shown under the general issue. *Insurance Co. v. Field*, 42 Ill. App. 392; *Insurance Co. v. Baker*, 49 id. 92; 153 Ill. 240; 11 Ency. of Pl. & Pr. p. 421, par. 2; 1 Shinn's Pl. & Pr. sec. 692; *Wann v. McNulty*, 2 Gilm. 360.

Under non-assumpsit, anything may be proved which shows plaintiff, when he commenced suit, had no cause of action. 1 Chitty's Pl. (13th Am. ed.) p. 478, note 2.

Any change in or transfer of the interest of the assured calculated to make him less watchful in guarding it from fire or have an influence in tempting him to burn the property is a sale, in violation of the terms of the policy. May on Insurance, sec. 273.

A recorded bond for a deed notifies third parties that the property has been sold. *Snapp v. Peirce*, 24 Ill. 157.

A sale is the transfer of a right from one to another, for a consideration. Rapalje's Law Dic. 1144; Tomlin's Law Dic. 415.

Where an insurance policy contains a clause that in case of a change of title without the consent of the insurer endorsed on the policy the insurance shall terminate, the death of the insured effects such change of title as terminates the insurance. *Miller v. Insurance Co.* 54 Ill. App. 53; *Dick v. Insurance Co.* 22 Ill. 272.

Where an owner of insured property executes a written instrument reciting that he has sold the property to the vendee therein named and binds himself to convey

it upon payment being made, and the vendee takes possession under the contract and pays part of the purchase money, such transaction constitutes a sale of the property, within the meaning of an insurance policy which provides that if the property be sold or a change takes place in the title or possession the insurance shall terminate; and this is true even though the contract is abandoned by the parties before consummation by execution of a deed. *Davidson v. Insurance Co.* 71 Iowa, 532; *Insurance Co. v. Flurnoi*, 19 S. W. Rep. 793; *Cottingham v. Insurance Co.* 14 id. 417; *Smith v. Insurance Co.* 23 Pac. Rep. 384.

The vendor in a land sale contract, under which the vendee has taken possession, is not such an owner as will support a policy insuring his dwelling on the land, and conditioned to be void if he is not the sole and absolute owner. *Hamilton v. Insurance Co.* 98 Mich. 535; 13 Am. & Eng. Ency. of Law, (2d ed.) 235.

A purchaser of real estate who has paid part of the purchase money and taken possession under a sale contract is the sole and unconditional owner of the property, within the meaning of an insurance policy stipulating that he is such. *Johannes v. Standard Fire Office*, 70 Wis. 196; *Dupreau v. Insurance Co.* 76 Mich. 615; *Pelton v. Insurance Co.* 77 N. Y. 605; 13 Hun, 23; *Siter's Appeal*, 26 Pa. St. 180; *Elliott v. Insurance Co.* 12 Atl. Rep. 676; *Insurance Co. v. Dunham*, id. 668; *Lewis v. Insurance Co.* 29 Fed. Rep. 496; *Martin v. Insurance Co.* 44 N. J. L. 485; *Insurance Co. v. Erb*, 112 Pa. St. 149; *Weiner v. Insurance Co.* 153 Mass. 335; *Insurance Co. v. Dyches*, 56 Texas, 565; *Railway Co. v. Spencer*, 27 Atl. Rep. 113; *Insurance Co. v. Crockett*, 7 Tenn. 725.

When a policy permits a local agent to exercise a specific authority, but restricts the exercise of such authority by written endorsement on the policy, the restriction is of the essence of the authority, and the consent or waiver by the local agent not so endorsed upon the policy is void. *Insurance Co. v. Mette*, 27 Ill. App. 325; *Quinnland v. Insurance Co.* 133 N. Y. 356; *Baumgartel v. Insurance Co.*

136 id. 547; *Knudson v. Insurance Co.* 75 Wis. 198; *Smith v. Insurance Co.* 60 Vt. 682; *Kyte v. C. U. A. Co.* 144 Mass. 43; *Cleaver v. Insurance Co.* 65 Mich. 527; *Henkins v. Insurance Co.* 70 Wis. 1; *Barre v. Insurance Co.* 76 Iowa, 609; *Insurance Co. v. Holzgrafe*, 53 Ill. 516.

HAROLD A. WELD, for appellee:

The contract of sale was properly excluded under the issues. There was no alienation. *Insurance Co. v. Kelly*, 32 Md. 421; *Insurance Co. v. Stewart*, 19 Pa. St. 45; *Insurance Co. v. Bethel*, 142 Ill. 537; 42 Ill. App. 475; *Trumbull v. Insurance Co.* 12 Ohio, 305; *Hill v. Cumberland Valley M. P. Co.* 59 Pa. St. 474; *Chappell v. McKnight*, 108 Ill. 570; *Insurance Co. v. Updegraff*, 21 Pa. St. 513; *Walters v. Walters*, 132 Ill. 467; 1 May on Insurance, (3d ed.) par. 267; 3 Joyce on Insurance, par. 2284; 1 Wood on Insurance, par. 351; *Phillips v. Insurance Co.* 10 Cush. 352; *Shotwell v. Insurance Co.* 5 Bos. 247; Ostrander on Insurance, par. 65; *Insurance Co. v. Jackson*, 16 B. Mon. 253; *Clinton v. Insurance Co.* 45 N.Y. 454; *Masters v. Insurance Co.* 11 Barb. 624; *Gates v. Smith*, 4 Edw. Ch. 702.

The breach of conditions subsequent, if relied on to avoid the policy, should be specially pleaded, and as to them the burden of proof is on the defendant. They are not admissible under the general issue. 2 May on Insurance, par. 591; 4 Joyce on Insurance, par. 3691; *Benjamin v. Indemnity Ass.* 44 La. Ann. 1017; *Insurance Co. v. Hamill*, 6 Gill, 87; *Fogg v. Griffen*, 2 Allen, 1; *Dyer v. Insurance Co.* 53 Me. 118; *Castor v. Insurance Co.* 54 id. 170; *Insurance Co. v. Rogers*, 119 Ill. 481.

It was not contended in the courts below that evidence tending to prove a sale or change of possession of the property was admissible under the general issue. That point cannot be made for the first time in this court. *Case v. Phillips*, 55 N. E. Rep. 66; *Railway Co. v. McDougall*, 113 Ill. 603; *Casualty Co. v. Waterman*, 161 id. 632; *Coal Co. v. Kelly*, 156 id. 9.

Per CURIAM: The Appellate Court in deciding this case rendered the following opinion:

"Appellant, on January 3, 1894, issued a policy to appellee insuring his barn on his farm in the sum of \$2500 against loss by fire for five years, and also insuring certain personal property. The barn was destroyed by fire on September 28, 1897. Appellee brought this suit on the policy to recover for said loss.

"The policy contained the following conditions: 'If the property be sold or transferred (in whole or in part) \* \* \* or any change takes place in title or possession, \* \* \* whether by \* \* \* voluntary transfer, assignment or conveyance, or if the title or possession be changed from any cause whatsoever, or if this policy shall be assigned before a loss without written notice to and the consent of the company endorsed hereon, this policy shall in each and every instance be void. \* \* \* If the interest of the assured in the property be other than an unconditional, exclusive ownership, and, if it be real property, if it be other than an absolute fee simple title, or if any other person or persons have any interest whatever in the property described, whether it be real estate or personal property, \* \* \* or if there be a mortgage or other encumbrance thereon, \* \* \* whether inquired about or not, it must be so notified to the company and be so expressed in the written part of this policy, otherwise the policy shall be void. When the property insured (or if it be a building or machinery therein, the land upon which it stands,) shall be sold or encumbered or otherwise disposed of, written notice shall be given to the company of such sale or encumbrance or disposal, and its assent thereto endorsed thereon, otherwise this insurance on said property shall immediately terminate. \* \* \* Persons sustaining loss or damage by fire shall within six days give notice in writing of said loss to the company, and within thirty days from the date of the fire shall render a particular and specific

account of such loss; failing so to do within said thirty days this policy shall become and be null and void.'

"At the trial the destruction of the barn by fire was proved, and it was stipulated that the value of the barn at the time it was burned was the amount remaining unpaid on the policy. Appellee recovered judgment, and this is an appeal therefrom.

"Appellant, by many pleas filed, sought to interpose three defenses: First, failure to present proofs of loss within thirty days, as required by the policy; second, failure to notify appellant of a mortgage resting upon the real estate when the insurance was written; and third, that appellee, after the policy was issued and before the fire, sold the premises and did not give written notice of the sale to appellant nor procure its assent thereto to be endorsed upon the policy.

"Appellee undertook to avoid the first of said defenses by showing oral notice by him to an agent of appellant within six days after the loss, and written notice by said agent to the officers of appellant, followed by language and acts of agents of appellant constituting a waiver of proofs of loss within thirty days. Appellee sought to avoid the defense as to the mortgage by showing that before the policy was issued he notified appellant's agent of said mortgage, and was informed by the agent that it need not be referred to in the policy. The evidence on these two subjects was conflicting. If the jury believed the evidence offered by appellee these defenses were overcome by him. We are unable to say that the jury erred in their decision of these questions of fact, or that another jury upon the same evidence would reach a different conclusion.

"The difficulty in the case arises under the defense thirdly above stated. By its second amended plea appellant set up that appellee and his wife, on February 6, 1896, by an instrument in writing under their hands and seals sold the insured property, and the land on which it

stood, to Peter Thuren, his heirs and assigns, for \$13,500, without written notice to appellant and its assent there-to endorsed on said policy, whereby said insurance immediately thereafter terminated. The third amended plea set up the same facts, and further, that on February 28, 1898, (which was after the fire,) pursuant to said sale, appellee and his wife executed and delivered to Thuren a deed of said premises in fee simple, whereby the said policy immediately terminated. The first replication to said pleas was that the property was not sold before said loss, as charged. Upon this, issue was joined. The second replication thereto set up that said instrument mentioned in said pleas was a bond for a deed; that after its execution appellee notified an agent of appellant thereof; and set up language of said agent relied upon as a waiver of further notice and of an endorsement on the policy, and that in reliance thereon he had paid Thuren the amount of the loss. The third replication to said pleas set up notice to said agent of the bond for a deed, and language of said agent relied upon as a waiver. The rejoinders to said second and third replications were to the effect that appellant did not waive the conditions of the policy relative to a sale of the property and is not estopped as charged.

"In this state of the pleadings upon the subject of a sale of said premises, appellant offered in evidence at the trial a bond for a deed executed February 26, 1896, by appellee and his wife, which recited that they had this day sold to Peter Thuren, his heirs and assigns, for \$13,500, certain land described (being that on which the barn stood); that \$1200 was to be paid at the ensealing and delivery of that instrument and a note given for \$3300, due March 1, 1904, with interest at six per cent per annum, and a note for \$9000, due March 1, 1911, with like interest, and that upon payment of the first note deed was to be given and mortgage made to secure the \$9000 note. By said bond appellee and his wife bound

themselves, under a penalty of \$10,000, upon said payments being made, to convey the premises to Thuren in fee simple by warranty deed. Time was made of the essence of the contract. Appellee objected to the introduction of the bond in evidence. That objection was sustained and appellant excepted. The question then is, whether the giving of such a bond or contract, coupled with payment of part of the purchase money, was a sale of the premises, within the meaning of this policy.

"The authorities upon this subject are conflicting. Such a contract is held not to be a sale within the meaning of such a provision in a policy of insurance, and the vendor is held to be still the owner, in *Washington Fire Ins. Co. v. Kelly*, 32 Md. 421, *Perry County Ins. Co. v. Stewart*, 19 Pa. St. 45, *Insurance Co. v. Updegraff*, 21 id. 513, *Hill v. Cumberland Valley Mutual Protection Co.* 59 id. 474, *Trumbull v. Portage County Mutual Ins. Co.* 12 Ohio, 305, *Browning v. Home Ins. Co.* 71 N. Y. 508, May on Insurance, sec. 267, 1 Wood on Insurance, sec. 331, and in other cases cited in said authorities. The contrary is held in the opinion of the majority of the court in *Davidson v. Hawkeye Ins. Co.* 71 Iowa, 532, and in *Johannes v. Standard Fire Office*, 70 Wis. 196, *Dupreau v. Hibernia Ins. Co.* 76 Mich. 615, and *Hamilton v. Dwelling House Ins. Co.* 98 id. 535. The question seems not to have been directly determined in this State. In this conflict of authority we conclude that the determination of the trial court that the execution and delivery of the bond did not constitute a sale within the meaning of the policy is most in harmony with analogous principles settled in this State. That the vendor retained the legal title is unquestioned. (*Langlois v. Stewart*, 156 Ill. 609.) But the vendee did not have even the equitable title. 'A mere contract or covenant to convey at a future time, on the purchaser performing certain acts, does not create an equitable title. When the purchaser performs all acts necessary to entitle him to a deed, then, and not till then, he has an equitable title and may compel a conveyance.



When the purchaser is in a position to compel a conveyance by a bill in chancery he then holds the equitable title. Before that he only has a contract for a title when he performs his part of the agreement.' (*Chappell v. McKnight*, 108 Ill. 570; *Walters v. Walters*, 132 id. 467.) The Michigan cases cited *supra* rest upon the contrary principle that a vendee who has paid part of the purchase money is the equitable owner in fee. As in this State such a vendee has neither legal nor equitable title, the provisions of the policy in suit relative to a change of title were not violated by entering into the bond for a deed. Under the doctrine stated in *Hill v. Cumberland Valley Mutual Protection Co.* *supra*, appellee will not thereby acquire and keep for his own use both the purchase money and the insurance money, but upon the receipt of the insurance money he will hold it for the benefit of the vendee, who will be entitled to credit therefor upon his contract. This accords with the rule in this State that the vendor is trustee of the title for the benefit of the vendee. (*Sutherland v. Goodnow*, 108 Ill. 528; *Fuller v. Bradley*, 160 id. 51.) In *Stevenson v. Lochr*, 57 Ill. 509, after such a contract had been made, part of the land was condemned by a railway company. It was held that if the vendor received the damages he must hold them as trustee for the purchaser, to be accounted for when the purchase money is paid. This principle obviates the main objection upon which the case above cited from 71 Iowa is based. Appellee pleaded and offered to prove in rebuttal that he had paid Thuren the full amount of insurance on the barn. To this the court sustained an objection, and properly, as the bond to Thuren had not been admitted in evidence.

"Appellee paid appellant the required premium for this insurance. There is no claim that appellant was in any way injured by the giving of the bond for a deed. It is not claimed that any fraud was practiced upon appellant or that the loss was any other than an honest one.

The defense is purely technical. We conclude that under the rules prevailing in this State, appellee, after he gave the bond for a deed, still held the legal and equitable title, and is entitled to recover.

"Although the trial court sustained objections to all direct evidence that Thuren took possession before the fire, that fact was indirectly proven. That proof, however, does not in this case entitle appellant to avoid the policy under the clause thereof relating to a change of possession, because appellant saw fit not to allege and plead such change of possession as a defense. Clearly, it could not avail of such change of possession as a defense without specially pleading it and giving appellee an opportunity to set up by replication any matter of waiver or otherwise which he might be able to present. The record of the proceedings kept by the clerk shows that on the third day of the trial (and apparently at or about the close of the testimony) appellant asked leave to file an amendment to its second amended additional plea, so as to charge that appellee delivered possession of the premises to Thuren, and the latter thereafter remained in possession, and that the court refused such leave and appellant excepted. The abstract does not show, nor can we find in the record, that this action and exception are preserved in the bill of exceptions. Further, it does not appear that any showing was made in support of the motion. The correctness of the ruling is therefore not presented for decision. Moreover, the evidence (including a letter from appellant's general adjuster) places it beyond dispute that this change of possession was known to the officers of appellant soon after the fire, and there is evidence tending to show its agents knew it before the fire. No reason appears why appellant could not have set up this defense long before. The pleadings were voluminous and had already been extensively amended by appellant. We are unable to say the court was guilty of an abuse of discretion in refusing the

leave at that late stage of the trial, when no showing was made to support it, nor any excuse for not having presented the defense before the trial. (*Phenix Ins. Co. v. Stocks*, 149 Ill. 319.) It might well be that appellee would have needed to prepare a special replication to such amendment by way of confession and avoidance, requiring care and time to properly present his answer thereto. The court was not bound to permit that which might result in such delay.

"As change of possession was not pleaded as a defense, the fact that proof thereof incidentally crept in did not call upon appellee to rebut that defense by proof of any kind, nor entitle appellant to the benefit of that proof as a defense, nor to have the jury instructed upon the effect of a change of possession under the provisions of the policy in suit. The instructions appellant offered on that subject were therefore properly refused. If the court ruled correctly in holding that the contract was not a sale, and in refusing to admit it in evidence, then there was no evidence before the jury of a sale of the premises in violation of the terms of the policy, and the court properly refused appellant's instructions upon that subject. The only defenses duly pleaded which there was proof tending to establish were failure to present proofs of loss within thirty days and failure to give notice of a mortgage resting upon the premises when the insurance was written. Upon these subjects the jury were correctly and fully instructed.

"We find no substantial error in the record.

"We have not set out or discussed the provision of the policy that no agent of the company except its principal officers in New York and its general agent at Chicago should have power to waive or modify any condition of the policy, etc., for the reason that such provision may itself be waived by the insurer and by the language and conduct of its agents having apparent power to bind it, (*Phenix Ins. Co. v. Hart*, 149 Ill. 513, *Dwelling House Ins. Co.*

v. *Dowdall*, 159 id. 179,) and we are of opinion it was waived in this case. The judgment is therefore affirmed."

After a careful consideration of this case we have arrived at the same conclusion as that reached by the Appellate Court, and find that the reasons for such conclusion are sufficiently set forth in the opinion of that court, rendered by Mr. Justice DIBELL. That opinion is accordingly adopted as the opinion of this court.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

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W. B. DOLLAHON *et al.*

v.

GEORGE M. WHITTAKER *et al.*

*Opinion filed October 19, 1900.*

1. TAXES—*water tax must be included within the two per cent limit.* A city organized under the general law has no authority to exceed the two per cent limit upon municipal taxes in order to raise funds for water supply.

2. SAME—*decree enjoining collection of excess affects all levies alike.* A decree declaring invalid and enjoining the collection of municipal taxes exceeding the two per cent limit affects all levies alike, where it is not claimed that any particular one is illegal.

APPEAL from the Circuit Court of Lawrence county; the Hon. E. E. NEWLIN, Judge, presiding.

N. M. TOHILL, State's Attorney, W. F. FOSTER, City Attorney, and SYLVESTER J. GEE, for appellants.

E. S. KINGSBURY, S. B. ROWLAND, and C. J. BORDEN, for appellees.

Mr. JUSTICE CARTER delivered the opinion of the court:

Upon a hearing of the issue made upon the bill of appellees, twenty-eight tax-payers of the city of Lawrenceville, the court enjoined the city and the collector

of the town from collecting from the complainants an alleged illegal tax,—that is, a tax levied by the city in excess of two per cent for general municipal purposes and one-half of one per cent for interest on its bonded indebtedness.

The whole amount levied was three and one-half per cent. Aside from the interest tax, the levy for municipal purposes was three per cent, which, it seems, included one per cent for water. The city had the power, under the statute, to provide for a supply of water, but the statute conferring such power does not authorize it to exceed the limit of two per cent provided by section 1 of article 8 of the act for the incorporation of cities and villages, in order to raise the necessary funds with which to pay for such supply of water. The tax for water must be included within the two per cent, like taxes for other corporate purposes. *People ex rel. v. Lake Erie and Western Railroad Co.* 167 Ill. 283; *Chicago and Alton Railroad Co. v. People ex rel.* 177 id. 91.

Appellants say that the court erred in not finding by the decree whether it was the water tax or some other tax that was illegal. We do not understand that that question was involved. It was not claimed that the tax for water was in itself illegal, but only that the excess levied for general corporate purposes over the limit fixed by the statute was illegal.

Inasmuch as the tax levied to pay interest on city bonds is by the statute excluded from the limitation of two per cent, no question as to its legality is raised, but all of the remaining three per cent in excess of two per cent was illegal and its collection was properly enjoined. The decision, however, affects the water tax no more than it does the other levies included in the three per cent.

The decree will be affirmed.

*Decree affirmed.*

JOHN JOHNSON *et al.*

v.

OCDEVIAH JOHNSON *et al.**Opinion filed October 19, 1900.*

1. APPEALS AND ERRORS—*what may be stated in bill of exceptions to raise legal questions only.* If only legal questions, such as the effect of giving or refusing instructions, are intended to be raised on appeal or error, it is proper for the bill of exceptions or certificate of evidence to state that there was evidence tending to support both sides of the case.

2. SAME—*verdict of jury in will case on conflicting evidence has same weight as in suit at law.* The verdict of the jury in a will contest, rendered on conflicting testimony, is entitled to the weight given to a verdict in a suit at law, and will not be set aside on appeal or error unless clearly contrary to the weight of evidence.

3. WILLS—*effect on proponent's prima facie case if one subscribing witness is impeached.* In a will contest, if the defendants introduce the will, the certificate of the oaths of the subscribing witnesses at the time of probate and the testimony of both subscribing witnesses, a *prima facie* case in favor of the will is made out, even though evidence is introduced tending to impeach one subscribing witness.

4. SAME—*"credible" witnesses means "competent" witnesses.* The statute requiring the attestation of a will by two "credible" witnesses means competent witnesses, and their competency is to be tested by the state of facts existing at the time of such attestation.

5. SAME—*impeachment of subscribing witness on contest does not relate back.* If one of the subscribing witnesses to a will is impeached with reference to matters stated in her testimony in a proceeding to contest the will, such impeachment does not relate back to the time the will was executed.

6. INSTRUCTIONS—*when instruction as to rejecting testimony of witness is correct.* An instruction upon the right of the jury to reject the testimony of any witness whom they believe, from the evidence, has sworn falsely to a material matter, is properly framed which makes an exception in favor of such of the testimony as is corroborated by other evidence.

7. SAME—*when failure of instruction to mention one issue is not prejudicial.* An instruction authorizing the jury to find in favor of the will if they believe the testator to have been of sound mind and memory is not prejudicial to the contestant although one of the issues raised is undue influence, if other instructions call the attention of the jury to the fact that they must find there was no exercise of undue influence in order to sustain the will.

187	86
192	*535
96a	*543
98a	*456

187	86
194	*62
196	*171
e196	*172
187	86
200	*1801

187	86
202	*513
202	*620
187	86
109a	*812
187	86
114a	*621

8. EVIDENCE—*presumption of sanity is in proponent's favor—burden of proof.* If the proponents have made out a *prima facie* case in favor of the validity of the will the law adds the legal presumption of the testator's sanity, and the contestant has the burden of proving unsoundness of mind by a preponderance of evidence.

WRIT OF ERROR to the Circuit Court of DeWitt county;  
the Hon. W. G. COCHRAN, Judge, presiding.

The original bill in this case was filed on July 20, 1899, and the amended bill was filed on January 8, 1900. The object of the bill, as originally filed and as thus amended, is to set aside the will of Thomas Johnson, deceased, upon the alleged grounds, that the said testator was not of sound mind and memory when he made his will, and that he was under undue influence exercised over him by the defendants in error, Ocdeviah Johnson, Jesse L. Johnson, and Phoebe H. Swigart. The bill also alleges that there were but two subscribing witnesses to the will, and that they or either of them did not believe at the time of the signing of the will, that the testator was of sound mind and memory, and that, by reason thereof, said will was not properly nor lawfully probated, and that it was not the last will of the deceased. The bill was answered by the defendants thereto who are the defendants in error here. The issues of fact were submitted to the jury, who returned a verdict finding the will in question to be the last will and testament of Thomas Johnson, deceased. A motion for a new trial was made and overruled, and a decree was entered, dismissing the bill, and for costs, against the plaintiffs in error. The present writ of error is sued out for the purpose of reviewing the decree thus entered by the court below.

The will bears date October 14, 1897. Thomas Johnson died on February 9, 1898. The will was filed for probate, and admitted to probate, on March 15, 1898, and Isaac F. Houseman, one of the defendants in error herein, was appointed executor. John Johnson, Silas Johnson,

Emily Swigart and Sarah Ann Zimmerman, who are plaintiffs in error here, and complainants in the bill below, are the children of Thomas Johnson, deceased, by his first wife. The defendants in error here, who are the defendants below, are Ocdeviah Johnson, the widow of the deceased and his second wife, and Jesse L. Johnson and Phœbe H. Swigart, his children by his second wife. Defendant in error, A. Davis, is a legatee under the will.

The will devises to the plaintiffs in error \$25.00 each; to Sarah Ann Zimmerman, in addition to the \$25.00, five large silver spoons; and to defendants in error, Phœbe H. Swigart \$500.00, and to Jesse L. Johnson \$25.00 and the testator's gold watch; and to A. Davis his gold-headed cane; and the residue of his estate to defendant in error, Ocdeviah Johnson, the widow. By the will I. F. Houseman, defendant in error, is appointed executor. There are two subscribing witnesses to the will, to-wit, Minnie Derring and Orie Wood. The attesting clause, under which the names of the subscribing witnesses are written, is as follows: "The above and foregoing instrument was at the day of the date thereof signed, sealed, published and declared by the said Thomas Johnson as and for his last will and testament, and we, in his presence and in the presence of each other, have, at the request of the said Thomas Johnson, signed our names as witnesses thereto, believing the said Thomas Johnson, at the time of so subscribing our names as witnesses as aforesaid, of sound mind and memory."

The three following issues were submitted to the jury: "*First*—Was the writing read in evidence, purporting to be the last will and testament of Thomas Johnson, deceased, the last will and testament of the said Thomas Johnson or not? *Second*—Was the said Thomas Johnson, at the time of the execution and attestation of the said writing read in evidence, purporting to be the last will and testament of the said Thomas Johnson, of sound mind and memory? *Third*—Was there any undue influence ex-



exercised over the said Thomas Johnson that resulted in the making of said will?"

The jury returned the following answers to the said questions, to-wit: "*First*—That the writing read in evidence, purporting to be the last will and testament of said Thomas Johnson, deceased, was the last will and testament of him, the said Thomas Johnson, deceased. *Second*—And that, at the time of the execution and attestation of the same, the said Thomas Johnson was of sound mind and memory. *Third*—And that said will was not the result of any undue influence exercised over him, the said Thomas Johnson." The verdict of the jury was as follows: "We the jury find the will in question to be the last will and testament of Thomas Johnson, deceased."

The certificate of evidence or bill of exceptions contains none of the evidence which was introduced upon the trial of the cause; but it contains the instructions that were given for the plaintiffs in error, and those that were given for the defendants in error, and also the instructions asked by the plaintiffs in error which were refused, and the instructions asked by the plaintiffs in error which were modified, and then given as modified.

The certificate of evidence or bill of exceptions certifies as follows: "The proponents of the will gave in evidence on their behalf testimony tending to prove the issues in their favor; thereupon, the complainants gave in evidence on their behalf testimony tending to prove the issues in their favor; that is to say, that the evidence of the case was conflicting. The complainants also gave in evidence evidence that tended to impeach the character of Annie Derrig, one of the witnesses to the will, for truth and veracity. The above and foregoing was all the evidence in the case offered by either party." Subsequently, an additional record was filed in this court showing an amendment to the certificate of evidence; and it appears from this amendment, "that the proponents in said cause offered in evidence the will in said cause to-

gether with the certificate of oath of witnesses to said will at the time of the first probate thereof, and that the said will and said certificate were offered and introduced in evidence by the defendants on the trial of said cause." By the amended certificate of evidence "the court further finds, that the proof in said cause shows that said will was executed in strict compliance with all the legal formalities and in the manner required by the statutes of this State; and that the evidence offered and given in said cause only tended to impeach the reputation of the subscribing witness, Minnie Derring, after the 14th day of October, 1897, and after the date on which said will was probated in the probate court of DeWitt county, Illinois."

TIPTON & TIPTON, for plaintiffs in error.

HERRICK & HERRICK, for defendants in error.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

*First*—The certificate of evidence in this case sets forth twenty-eight instructions given for the defendants in error, the proponents of the will; also thirty instructions given for the plaintiffs in error, the contestants of the will; also six instructions asked by the plaintiffs in error, but refused, and then modified, and given as modified, both the instructions as originally drawn and the instructions as modified being set forth in the bill of exceptions. After thus setting forth the instructions given as originally drawn, and the instructions given as modified, the bill of exceptions contains the following: "To the ruling of the court in giving the proponents' instructions and each of them, to the ruling of the court in refusing to give complainants' instructions that are modified, and the modifications of the same, to which modifications the complainants by their counsel then and there ex-

cepted." The bill of exceptions then sets forth twenty-one instructions asked by the plaintiffs in error which were refused by the court below. After setting forth these instructions the bill of exceptions contains the following: "Which the court refused to give; to which refusal to give said instructions, and to the refusal to give each and every one of them, the complainants then and there excepted."

If we were disposed to apply a strict, technical rule of interpretation to the bill of exceptions or certificate of evidence in this record, we would be obliged to hold that the only alleged error, of which the plaintiffs in error are entitled to complain, is the refusal by the trial court to give the instructions asked by plaintiffs in error, which were refused. There is really in the certificate of evidence no exception to the ruling of the court in giving the instructions of the proponents of the will, or to the ruling of the court in refusing to give the instructions for the contestants of the will which were modified. The complainants by their counsel excepted to the modifications made of the instructions which were modified, but did not except to the giving by the court of the modified instructions after they were so modified. It is not altogether clear, that the bill of exceptions, in the respects thus indicated, is not subject to the charge of ambiguity, uncertainty and omission. We have held that a bill of exceptions is not to be considered as a writing of the judge, but as a pleading of the party alleging the exception. Like any other pleading it is to be construed most strongly against the party preparing it, who must be responsible for all uncertainty and omission in his bill of exceptions. (*Garrity v. Hamburger Co.* 136 Ill. 499). Inasmuch, however, as it was evidently the intention of counsel for the plaintiffs in error to except to the ruling of the court in giving the instructions which were given for the defendants in error, and in refusing to give the instructions of the plaintiffs in error which were modified,

and in giving them as so modified, and inasmuch as the language used may, by a liberal interpretation, be construed as embodying such exception, we will proceed to consider some of the alleged errors assigned upon the record.

*Second*—The certificate of evidence in this case shows, that evidence was introduced, tending to support the issues, both in favor of the proponents of the will, and also in favor of the contestants of the will. We have recently held, that it is proper for a bill of exceptions to state, that the evidence tends to prove the facts, and that, in such case, legal questions alone, such as the giving or refusal of instructions, are intended to be raised on appeal or writ of error. (*Costly v. McGowan*, 174 Ill. 76). It also appears from the bill of exceptions that the evidence in the case was conflicting, and, where such is the fact, the verdict of a jury, in a case contesting a will in chancery under the statute, has the same force and effect, as are given to a verdict in a case at law under a like state of facts. Where the testimony is conflicting, and it is not clearly against the weight of the evidence, the verdict of the jury must be held to be conclusive. (*Entwistle v. Meikle*, 180 Ill. 9).

*Third*—It is objected, in behalf of the plaintiffs in error, that some of the instructions, given by the court below for the defendants in error, took away from the jury the right to pass upon the formalities, attending the signing or execution of the instrument, offered in evidence as the will of the deceased testator. Strictly construed these instructions can hardly be regarded as erroneous, in view of the holding of this court, that the question, whether a will has been executed with all the proper formalities, is a question of law, and not a question of fact to be considered by the jury. (*Roe v. Taylor*, 45 Ill. 485; *Graybeal v. Gardner*, 146 id. 337; *Harp v. Parr*, 168 id. 459). But counsel for plaintiffs in error contend that, in this case, plaintiffs in error were injured by these

instructions, for the reason that there was evidence tending to impeach the veracity of one of the subscribing witnesses.

The two subscribing witnesses to the will were Minnie Derring and Orie Wood. The defendants in error introduced upon the trial below the will, and the certificate of the oaths of the subscribing witnesses to said will at the time of the first probate thereof. They also introduced the testimony of both of the subscribing witnesses to the will, in addition to the will itself and the certificate above mentioned. Undoubtedly, this testimony made a *prima facie* case in favor of the validity of the will. We have held that, if a will has been probated in the county court, a certificate of the evidence of the subscribing witnesses will be *prima facie* proof of the validity of the will in a proceeding in chancery which attacks the probate of the will. Where, in addition to this certificate, the testimony of one of the subscribing witnesses is also introduced, sustaining the validity of the will, a *prima facie* case in favor of its validity is unquestionably made out. (*Holloway v. Galloway*, 51 Ill. 159; *Buchanan v. McLennan*, 105 id. 56; *In re Page*, 118 id. 576; *Slingloff v. Bruner*, 174 id. 561; *Entwistle v. Meikle*, *supra*; *Harp v. Parr*, *supra*).

The theory of counsel is, that one of the subscribing witnesses to the will, Minnie Derring, was impeached, and that, therefore, the *prima facie* case, made by the defendants in error, was overthrown. The contention here made is, that the will must be attested by two credible subscribing witnesses under the provisions of the statute, and that, one of those subscribing witnesses having been impeached, the will is to be regarded as having only one subscribing witness, and, therefore, as not having been executed according to law. The first objection to this contention is, that the expression "credible witness," as used in the statute, means "competent witness." In other words, a credible witness, within the meaning of

the Statute of Wills, is a competent witness. (*Fisher v. Spence*, 150 Ill. 253; *In the matter of Noble*, 124 id. 266; *Harp v. Parr*, *supra*). The next objection to such contention is, that the competency of attesting witnesses to a will is to be tested by the state of facts existing at the time of such attestation. (*Fisher v. Spence*, *supra*; *Slingloff v. Bruner*, *supra*).

So far as we can gather from the language of the instructions, and from the meager statements made in the bill of exceptions or certificate of evidence, the subscribing witness, Minnie Derring, who testified in this case in favor of the validity of the will, is said to have made certain statements out of court contrary to the statements, which she made when testifying as a witness in this proceeding begun for the purpose of setting the will aside. These contradictory statements are alleged to have been made on July 23, 1899, three days after the filing of the original bill in this cause. If it were true, that this alleged contradiction of the evidence of Mrs. Derring weakened, or destroyed, the effect of her testimony as given upon the trial of this proceeding, there were yet remaining the will and the certificate of the testimony of the subscribing witnesses at the original probate of the will in the county court, and the testimony of the other subscribing witness, Orie Wood, sustaining the validity of the will. Even, therefore, if the testimony of Minnie Derring was thrown out, sufficient evidence was introduced by the defendants in error, outside of her testimony, to make a *prima facie* case in favor of the validity of the will under the authorities above quoted.

No attempt was made to show the incompetency of the subscribing witness, Minnie Derring, at the time when she signed the attestation clause attached to the will, or at the time when the will was admitted to probate in the county court, or to show that she was at either of these dates unworthy of belief. If she was so far impeached as to be regarded unworthy of belief, her impeachment had

reference to a date long subsequent both to the execution and to the original probate of the will. It cannot be contended that if, in a chancery proceeding to set aside a will, one of the subscribing witnesses is impeached, the impeachment extends back to the date of the execution of the will, so as to make it a will with only one subscribing witness, instead of two. To establish such a rule as this would be to open the door to fraud and corruption. It would place it in the power of a subscribing witness, long after the will was admitted to probate, to retract and undo what had already been established by the testimony of such witness. In the recent case of *Thompson v. Owen*, 174 Ill. 229, this court referred with approval to the case of *Abbott v. Abbott*, 41 Mich. 540, where one of the attesting witnesses to a will failed to remember, and could not, therefore, testify, that all the formal requisites, required by the statute to be observed, had been complied with, and quoted from that case the following statement: "But we know of no rule of law which makes the probate of a will depend upon the recollection, or even the veracity, of a subscribing witness. The law, for wise and obvious reasons, requires such instruments to be executed and attested with such precautions as will usually guard against fraud. But if the forgetfulness or fraud of a subscribing witness can invalidate a will, it would be easy in many cases to use such artifices or corruption as would render the best will nugatory." In *In the matter of Noble*, 124 Ill. 266, it was held that the mere fact, that an attesting witness to a will has pleaded guilty to an indictment for forgery, will not render him incompetent to testify on the probate of the will, although by statute a conviction of crime may be shown as affecting the credibility of the witness. Here, however, no attack was made upon the credibility of Mrs. Derring, so far as her testimony given upon the probate of the will in the county court is concerned. The contradictory statements, alleged to have been made out of court, are

charged to be contradictory merely of her testimony as given upon the trial of this case, that is to say, in a suit in chancery brought to set the will and its probate aside.

The court, however, did give, in behalf of the plaintiffs in error, one or more instructions to the effect that, if the jury believed from the evidence that any witness made statements out of court on or about July 23, 1899, contrary to what such witness had sworn to upon the trial, upon any material matter, then these contradictory statements would tend to impeach the witness, and the jury would be justified in rejecting her testimony, except in so far as she should be corroborated by other testimony. The instructions, thus given by the court, are objected to by counsel for plaintiffs in error, because they qualified the right of the jury to reject the contradicted testimony by making an exception in favor of such testimony so far as it was corroborated by other evidence. Such an instruction as this has been frequently endorsed by the decisions of this court. (*City of Sandwich v. Dolan*, 141 Ill. 430; *Miller v. People*, 39 id. 457; *Bowers v. People*, 74 id. 418).

*Fourth*—Complaint is made, that one of the instructions given for defendants in error called the attention of the jury to the question, whether or not the deceased, Thomas Johnson, was at the time of the execution of the will of sound mind and memory, and authorized the jury to find a verdict in favor of the defendants in error, in case they should find from the evidence that at that time he was of sound mind and memory. The objection, made to the instruction, is that it did not call the attention of the jury to the other issue in the case, namely, whether the deceased was induced to make the will by undue influence, exercised over him by his second wife and her two children. In support of this objection, reference is made to the case of *Costly v. McGowan*, *supra*. In that case, however, it did not appear, that the jury were instructed to make any finding at all upon the question of



whether there had been an exercise of undue influence, but their attention was directed exclusively to the question, whether the testator was of sound mind and memory at the time of the execution of the will. Here, however, the record shows, that a number of instructions were given on behalf of the contestants of the will, which told the jury that, if they should find from the evidence, that undue influence had been used, it was their duty to declare the instrument introduced in evidence not to be the last will and testament of Thomas Johnson, deceased. Among these instructions was the twenty-fifth instruction, given for the plaintiffs in error upon the trial below, which used the following language: "If the jury find from all the evidence that undue influence was used as defined in these instructions, the jury will find that said paper is not the last will and testament of Thomas Johnson." In view of the fact that the attention of the jury was called frequently to the necessity of finding whether or not there had been an exercise of undue influence, the plaintiffs in error suffered no injury from the instruction complained of, which called attention only to the question whether the testator was of sound mind and memory or not. All the instructions are to be taken together and regarded as one charge; and it is impossible in this case, that the jury should not have understood they were to pass upon the issue as to the exercise of undue influence.

*Fifth*—Complaint is also made of an instruction given for the defendants in error, which told the jury that, if at a certain time about a month prior to the execution of the will, the testator was mentally competent to transact the ordinary business affairs of life, then the presumption of law is, that such mental competency continued, and that he was mentally competent to transact the ordinary business affairs of life when he executed the will, and that, unless the contestants showed by a preponderance of the evidence that the testator was not mentally competent to make his will, or was under the undue in-

fluence of his wife, or of his children, Jesse L. Johnson and Phœbe H. Swigart, or some one or more of them, on the last named date, then their verdict should be for the defendants. An instruction substantially the same in form as the one here complained of, was given in *Holloway v. Galloway*, *supra*. In that case it was said, that a person, seeking to establish a will, must prove the testator to have been of disposing mind and memory at the time he made the will, and not at some anterior period; but it was also said, that the instruction there given could have worked the plaintiffs in error no prejudice for the following reasons: "The defendants had put in evidence, as the statute authorizes, the testimony of the subscribing witnesses given when the will was admitted to probate, and this was *prima facie* evidence of its validity. This testimony raised a presumption of the competency of the testator, which would be valid until disproved by counter testimony. It placed upon the plaintiffs in error the burden of showing the incompetency of the testator, by proof sufficient to overcome the *prima facie* case made for him, and this is all that was required by the foregoing instruction. \* \* \* The instruction then really left the parties in the same position before the jury they would have occupied if it had not been given. It merely shifted upon complainants the burden of proof in case sanity had once been established, and that burden was already upon their shoulders, through the testimony of the subscribing witnesses." So, here, a *prima facie* case had already been made by the introduction of the will and the certificate of the subscribing witnesses at the date of its probate, and also by the testimony of one of the subscribing witnesses given in this proceeding. This having been done, and contradictory testimony having been produced tending to show want of necessary testamentary capacity, the defendants in error, asserting the validity of the will, were entitled to prevail, unless the contradictory testimony was sufficient to overcome or neutralize the

effect, not only of the affirmative testimony given in favor of the will, but also to overcome or neutralize the presumption arising from the general rule of law, that all men are presumed sane until the contrary is proven. "In weighing the conflicting proofs the party supporting the will is entitled to the benefit of this presumption." (*Carpenter v. Calvert*, 83 Ill. 62; *Taylor v. Pegram*, 151 id. 106). The law presumes every man to be sane until the contrary is proved, and the burden of proof rests upon the party alleging insanity. The proponents of the will must make out a *prima facie* case in the first instance in the manner already stated. The burden of proof is then upon the contestants to prove the allegations of their bill by a preponderance of the evidence. "The law throws the weight of the legal presumption in favor of sanity into the scale in favor of the proponents." (*Egbers v. Egbers*, 177 Ill. 82; *Entwistle v. Meikle*, *supra*; *Taylor v. Cox*, 153 Ill. 220). If, therefore, the instruction now under consideration was technically incorrect, it is impossible, in view of what has been said, that any injury from the giving of it could have resulted to the plaintiffs in error.

So far as the instructions asked by the plaintiffs in error and refused by the court are concerned, it is sufficient to say, that the substance of the propositions contained in such refused instructions, so far as they were sound, are embodied in instructions which were given.

After a careful examination of all the instructions as found in the record, we are unable to discover any such error as would justify us in reversing the decree of the court below. Accordingly, the decree of the circuit court is affirmed.

*Decree affirmed.*

PAULINE POEHLMAN *et al.*

*v.*

GEORGE SCHWEINFURTH *et al.*

*Opinion filed October 19, 1900.*

APPEALS AND ERRORS—*supposed facts not appearing of record can not be considered.* Facts stated by appellant in his argument but which do not appear in the record cannot be considered.

APPEAL from the Superior Court of Cook county; the Hon. A. H. CHETLAIN, Judge, presiding.

C. A. FITCH, for appellants.

CUTTING, CASTLE & WILLIAMS, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The superior court of Cook county granted to appellee George Schweinfurth a writ of assistance to put him in possession of premises held by appellants which they refused to surrender to him, and the appeal in this case was taken from the order for such writ.

The court allowed to appellants twenty days for filing a certificate of evidence introduced upon the hearing of the motion, but no certificate was filed. The clerk has copied into his transcript two affidavits in support of the petition, filed twenty days after the order was made, but they are not a part of the record, which contains only a petition for the writ, the answer of appellants thereto and the order of the court. The petition set forth that the premises were sold to the petitioner by a master in chancery at public sale, under a decree of said superior court in a cause wherein Edward S. Dreyer and the petitioner were complainants and the appellants and others were defendants; that the premises were sold in three separate parcels, for sums stated in the petition; that the sale and report thereof were confirmed by the court; that

the time of redemption from said sale having expired, petitioner obtained from said master in chancery three deeds conveying the premises to him, and exhibited the same to appellants, together with a certified copy of the order of said court confirming the sale, and that appellants refused to deliver up possession. The petition was verified by the oath of the petitioner, and appellants answered it, alleging that said decree and sale were erroneous and void for the reason that the sale was made to satisfy a decree of foreclosure and a judgment in favor of petitioner; that affirmative relief was not prayed for on account of the judgment; that the premises are the homesteads of appellants, and that no provision was made for said homesteads. By the order of the court the facts were found as stated in the petition and the writ of assistance was ordered.

Counsel for appellants says in his argument that the decree under which the premises were sold was entered in a suit for the foreclosure of three trust deeds upon the premises, which were the homesteads of appellants; that petitioner became the purchaser, and there was a surplus of \$3756.99 arising from the sale over and above the amount due him on his notes secured by his trust deeds, together with interest, costs and solicitor's fees; that the homesteads were not subject to petitioner's judgment, but that said judgment was satisfied out of the surplus without providing for the homesteads. None of these things appear in the record, and the supposed facts so stated in the argument cannot be considered. If an error was committed, as alleged, it was in and by some previous order or decree, which adjudicated the rights of the parties in the surplus arising from the master's sale, and such order is not under review in this case.

The order of the superior court is affirmed.

*Order affirmed.*

CHARLES BLACKMORE

v.

LINCOLN BLACKMORE *et al.**Opinion filed October 19, 1900.*

1. WILLS—*natural construction of words is preferred.* The natural construction of words used in a will will be adopted unless there is such an impracticability of so construing them as to authorize their rejection, or such uncertainty that no effect can be given to them in that sense.

2. SAME—*will construed.* A devise to the testator's son of a number of acres of land at a certain value per acre, the amount to be divided in equal parts among the testator's ten children, the devisee to have his share and pay annually to the other children what the cash rent for the land would be until they are all paid off, will be construed as giving to each child a tenth part of the stipulated value of the land and the right to receive a tenth part of the rent annually as compensation for the use of his interest in the land, until such time as he should receive his share of the estate.

APPEAL from the Circuit Court of Woodford county;  
the Hon. JOHN H. MOFFETT, Judge, presiding.

This is a bill in chancery filed in the circuit court of Woodford county by the appellant, Charles Blackmore, against the appellees, Lincoln Blackmore and Jessie Blackmore, his wife, alleging that his father, John Blackmore, departed this life on the 16th day of June, 1884; that he left him surviving, as his widow, Elizabeth Blackmore, and as his heirs, ten children; that at the time of his death and at the time of making his will John Blackmore was the owner of eighty acres of land known as the "Keley farm," one hundred and twenty acres known as the "Morgan farm" and one hundred and twenty acres known as the "old homestead," being in all three hundred and twenty acres; that he had aided some of his children by advancing money or property to them; that the testator, prior to his death, made his last will and testament, dated June 17, 1882, which will is as follows:

"*In the name of God:* I, John Blackmore, of the Town of Panola, in the County of Woodford, and State of Illinois, being of sound mind, memory and understanding, do make, publish and declare, this my last Will and Testament:

"1. I devise and bequeath all my Estate, Real and Personal property, to my dear wife, Elizabeth Blackmore, after her death the estate shall be divided as follows:

"2. My son Albert shall have Eighty acres in section Twenty-three, known as the Keley farm, said land shall be valued at Thirty-six Dollars per acre, the amount to be divided in equal parts among my sons & daughters. Albert to have *is* share in said farm & he shall pay *annuly* to my sons and daughters what the cash rent would be on the said farm until *the* are all paid *of*. Albert need not pay Charles, or Grant, as *the* will have to pay Albert the difference in the value of *there* farms.

"3. My son Charles shall have One Hundred & twenty acres in section twenty-six, known as the Morgan Farm, said land shall be valued at thirty-eight dollars per acre. Charles shall pay annually to my sons and daughters on the same condition as Albert.

"4. My son Grant shall have One Hundred & twenty acres in section twenty-six; this is the old homestead. Said land shall be valued at forty-five dollars per acre. Grant shall pay annually to my sons & daughters on the same condition as Albert.

"5. None of the above estate shall be mortgaged nor sold until my sons & daughters are all paid off. My executors shall divide personal property. My *to* youngest children shall have the household furniture.

"6. Those of my sons and daughters who have had or may have money from me, the same shall be deducted from *there* share of estate.

"7. I appoint my sons James Blackmore & Albert Blackmore, executors of this will.

"Witness my hand & seal this June 17, 1882.

JOHN BLACKMORE. [Seal.]

"Signed, sealed, published and declared by the testator in the presence of each of us, as his last Will and Testament, and we, in his presence, and in the presence of each other, & at his request, have signed our names as subscribing witnesses to such execution.

H. SOLZGERGER,  
ISAAC ZINSER."

The bill further alleges that said will was duly admitted to probate in the county court of Woodford county, Illinois, on the 31st day of July, 1884, and that his estate has been settled; that the widow of the testator survived her husband and died upon the first day of July, 1885; that after her death all the property of which the testator died seized and which was mentioned in said will was rented and one-tenth of the rents paid to each of the ten children of the testator until the amount of the rent received by them, respectively, equaled one-tenth of the value of the farms mentioned in the second, third and fourth clauses of said will, devised to Albert, Charles and Grant, respectively, at the price put upon them by the testator; that Charles Blackmore, the complainant in this suit, paid to each of his brothers and sisters the one-tenth share of what the cash rent would be on the Morgan farm, devised to him, and that each of his brothers and sisters except the defendant Lincoln Blackmore have received in annual payments, as rent, a sum in the aggregate equal to the full one-tenth part of what said land would come to at the price (\$38 per acre) placed upon the same by the testator, and upon such amount being received by them they severally quit-claimed to the complainant all right, title and interest in said land and released any claim they might have thereon by virtue of said will; that the said Lincoln Blackmore was paid the full value of one-tenth of said land at said price, except the sum of \$108.52, which amount, prior to the commencement of this suit, the complainant tendered to him and requested that he execute a quit-claim deed releasing any claim he might have upon said land, but this said Lincoln Blackmore refused to do, and that the complainant thereupon filed his bill in this cause offering to pay to the said Lincoln Blackmore the said sum of money, and asking to have the said Lincoln Blackmore release any claim or interest in said land he might have under and by virtue of said will.



The bill having been amended, the defendants filed a general demurrer thereto, which was sustained, and the complainant having elected to stand by his bill, a decree was entered dismissing the bill and for costs, from which decree the complainant has perfected this appeal.

ELLWOOD, MEEK & LOVETT, for appellant.

R. S. McILDUFF, for appellees.

Mr. JUSTICE HAND delivered the opinion of the court:

This case turns entirely upon the construction to be given to the will of John Blackmore, deceased. If complainant's construction of said will, and that under which all his brothers and sisters, except the defendant Lincoln Blackmore, have acted in releasing their claims, is correct, then the demurrer should have been overruled and the defendant Lincoln Blackmore be decreed to be entitled to only said sum of \$108.52, and upon payment of that sum to said Lincoln Blackmore he should be decreed to release the lien created in his favor by said will. On the other hand, if the construction placed upon said will by the court below is correct, then the said defendant Lincoln Blackmore is entitled to said sum of \$108.52; also to \$456, being one-tenth the valuation of said one hundred and twenty acres of land at \$38 per acre; and also to one-tenth of the rental value of said land from the time the last money was paid up to the time said \$456 is fully paid.

What the testator intended by said will is to be gathered from the will and the circumstances under which it was made. The will is inartificially drawn. It is evident that it was drawn by an illiterate person and one unlearned in the law and even unacquainted with the correct use of the English language. In the second clause of the will the word "is" is used for "his;" "the" for "they" in two different places; "of" for "off" and "there" for "their;" while in the fifth clause the word "to" is used for the

word "two." In the sixth clause "there" is again used for "their." The third clause of the will is the one under which the complainant gets his right to the land in question, and to determine the meaning of it the second clause has to be taken in connection with it. When it comes to a construction of the fourth clause, the second clause has to be taken in connection with it. The third clause does not specifically refer to the second clause, but it speaks of the condition imposed upon Albert, which condition is found in the second clause, devising eighty acres of land to Albert. The second clause of the will is as follows: "My son Albert shall have Eighty acres in section Twenty-three, known as the Keley farm, said land shall be valued at Thirty-six Dollars per acre, the amount to be divided in equal parts among my sons & daughters. Albert to have *is* share in said farm & he shall pay *annuly* to my sons and daughters what the cash rent would be on the said farm until *the* are all paid *of*. Albert need not pay Charles, or Grant, as *the* will have to pay Albert the difference in the value of *there* farms." The third clause, being the clause under which the complainant gets his right, reads as follows: "My son Charles shall have One Hundred & twenty acres in section twenty-six, known as the Morgan farm, said land shall be valued at thirty-eight dollars per acre. Charles shall pay annually to my sons and daughters on the same condition as Albert." It will be seen that the condition referred to and which was imposed upon Albert, and which is found in the second clause of said will, is as follows: "Albert to have *is* share in said farm & he shall pay *annuly* to my sons and daughters what the cash rent would be on the said farm until *the* are all paid *of*." This condition is to be, we take it then, read into said third clause and treated the same as though forming a part of it. It will be seen that the following language found after the price per acre in the second clause of said will, namely, "the amount to be divided in equal parts among my sons & daughters," is not

found in the third clause of said will; but that it is to be treated as though it were we make no question, for we see that in the last two lines of the second clause of said will the testator provided that "Albert need not pay Charles or Grant as *the* will have to pay Albert the difference in the value of *there* farms."

We think the idea of equality pervades this entire will and each and every clause of it; that an equal division of the value fixed upon the farms by the testator among his children was the evident intent of the testator. If this were his intention then that intention must prevail. It is further evident from the will that the testator designed to keep the three farms devised to Albert, Charles and Grant in the Blackmore family. To effect such intention and avoid a sale he devised his land to his sons, Albert, Charles and Grant, and fixed a valuation thereon to govern his heirs in the settlement of his estate. The farm devised to Albert was valued at \$36 per acre, and that devised to Charles at \$38 per acre and that devised to Grant at \$45 per acre, the three farms upon such valuation aggregating the sum of \$12,840. This amount, he directs, "shall be divided in equal parts among my sons & daughters." The time of such division is fixed by the last clause of the first paragraph of the will after the death of his wife. As further evidence that the testator had determined upon an equal division of his estate between his children he provides by paragraph 6: "Those of my sons and daughters who have had or may have money from me, the same shall be deducted from *there* share of estate."

The difficulty arises over the following language found in the second paragraph of the will: "Albert to have *is* share in said farm & he shall pay *annuly* to my sons and daughters what the cash rent would be on said farm until *the* are all paid *of*." At the time the will was made, Albert, Charles and Grant were minors. It was evident to the testator that his children, other than such sons,

might not come into the possession of their share of the estate for some time, should he and his wife die soon, by reason of the inability of Albert, Charles and Grant to pay them their portion thereof. We think such provision was inserted in the will with a view to cover such contingency, and was to be the payment to them of rent for the use of and in lieu of interest on their shares of the estate until the same should be paid to them. Such construction is not strained or unnatural, but is in harmony with the idea of equality which pervades the will. The construction of a will depends upon the intention of the testator, to be ascertained from a full view of everything contained within "the four corners of the instrument." The natural construction of the words will be adopted unless there is such an impracticability of so construing them as to authorize their rejection, or such uncertainty that no effect can be given to them in that sense. (*Taubenhan v. Dunz*, 125 Ill. 524.) A technical construction of words and phrases, although *prima facie* the one which should prevail, will not be carried to the extent of defeating any obvious general intention of the testator, since wills are often prepared by those wholly unacquainted with the precise technical force of legal formulas, and who, from a consciousness of such deficiency, often exert themselves to drag in such phrases wherever they suppose they would probably have been adopted by an experienced draughtsman. . 1 Redfield on Wills, (3d ed.) 435, 436; 29 Am. & Eng. Ency. of Law, 345; *Markillie v. Ragland*, 77 Ill. 98; *Brownfield v. Wilson*, 78 id. 467.

The fifth paragraph of the will shows that the testator intended to, and did, charge each of his three farms with the share of each of his children, save the particular one to whom a particular farm was devised. To hold that the annual rent as paid was a payment on the principal of the share of Lincoln Blackmore, would be to hold that the only interest he took by the will of his father in his father's estate was the right to receive one-tenth

of the rent thereof until such rent equaled the value thereof fixed thereon by the will, while Charles Blackmore would receive the same amount as rent and the Morgan farm at the end of such period. This construction would entirely destroy the equality contemplated by the will.

From a consideration of all the parts of this will we are satisfied the will gives to Lincoln Blackmore the one equal tenth part of the value of the Morgan farm as fixed by the will; that he has a lien thereon to secure the payment of such share, and is entitled to receive for the use of such share the one-tenth part of "what the cash rent" thereof will be until such share is paid.

We find no error in this decree, and the same will therefore be affirmed.

*Decree affirmed.*

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THE UNION NATIONAL BANK OF CHICAGO

v.

EDWARD HINES.

*Opinion filed October 19, 1900.*

1. PRACTICE—*trial court can only obey specific directions given on remanding a cause.* Upon the remandment of a cause by a court of review with specific directions to do some act, the court below has no power to do anything but carry out such specific directions.

2. SAME—*matters settled in former hearing are res judicata in carrying out specific directions.* In determining whether the lower court has carried out the specific directions given by the court of review upon remandment, all questions which were presented and discussed in the former hearing of the case are *res judicata*.

*Union Nat. Bank v. Hines*, 88 Ill. App. 245, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. FARLIN Q. BALL, Judge, presiding.

TENNEY, MCCONNELL, COFFEEN & HARDING, for appellant.

MORAN, MAYER & MEYER, for appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

This case has been before this court before, and is reported as *Union Nat. Bank v. Hines*, 177 Ill. 417. A reference to that decision will show what the facts in the case are without repeating them. The decision of this court upon the former hearing of the cause resulted in affirming the judgment of the Appellate Court, which was then brought before us for review. In *Union Nat. Bank v. Hines*, *supra*, we said: "We are satisfied there is no error in the judgment of the Appellate Court in reversing the decree below, the allegations of the bill being substantially proven upon the hearing." The superior court had rendered a decree, finding that the guaranty of the present appellee, as set forth in his letter to McElwee & Carney, dated March 22, 1893, was executed for the fraudulent purpose of creating evidence of an apparent defense to the note of \$15,000.00, executed by appellee on June 27, 1892, and payable on or before May 1, 1895, to the order of S. B. Barker. This decree of the superior court was reversed by the Appellate Court, and this court affirmed the action of the Appellate Court in so reversing the decree. The affirmance of the judgment of the Appellate Court by this court left nothing further to be done, except to carry into effect the mandate of the Appellate Court.

The judgment of the Appellate Court, which was here for review upon the former appeal, ordered that "the decree of the superior court of Cook county in this behalf rendered be reversed, annulled, set aside and wholly for nothing esteemed, with directions to the superior court of Cook county to enter a decree in accordance with the prayer of the original bill filed by appellant." When the

case went back to the superior court, it was the duty of that court, under the judgment of the Appellate Court, "to enter a decree in accordance with the prayer of the original bill filed by appellant," the appellant there being the present appellee. In accordance with this direction of the Appellate Court, the superior court entered a decree on April 26, 1899. The present appellant, the Union National Bank of Chicago, prayed an appeal from this latter decree to the Appellate Court, and the Appellate Court has affirmed said decree. The present appeal is prosecuted from this judgment of affirmance.

The only question in the case is, whether the decree of the superior court obeys the mandate of the Appellate Court, embodied in the judgment rendered by the latter court, which was affirmed by this court.

The present appellant, the Union National Bank of Chicago, was the holder of the note for \$15,000.00, made by the present appellee to Barker's order on June 27, 1892; and it held, for the purpose of securing the payment of that note, certain shares of the capital stock of the Edward Hines Lumber Company. Under the letter of March 22, 1893, written by appellee to McElwee & Carney, appellee had guaranteed the payment of certain notes executed by S. B. Barker & Co. to the order of McElwee & Carney, dated March 16, 1893, and given for the purchase of lumber. The four of these notes, mentioned and described in the original bill in this cause, amounted in the aggregate to \$16,426.06. There was another note for about \$5000.00, which was transferred to one Barth, and also embraced within the terms of the guaranty. These notes of March 16, 1893, were taken up by the appellee and surrendered to him by McElwee & Carney. As against the appellant bank, appellee was entitled to set off, against the note for \$15,000.00 and interest thereon held by the bank against him, the amount due to appellee upon the notes held by McElwee & Carney which he had guaranteed, and taken up. The decree

of April 26, 1899, found as follows: "It duly appearing to the court that the excess of the amount due was and is the sum of \$217.93, it is ordered, adjudged and decreed that, upon the payment or tender of payment by said Hines to said bank of said sum of \$217.93, being the sum due upon said \$15,000.00 note in said bill of complaint mentioned, at the date of the filing thereof, in excess of the amount due to said Edward Hines upon the notes in said bill of complaint mentioned as paid by him to McElwee & Carney under his guaranty in said bill of complaint mentioned, said bank is directed to deliver to said Hines or his solicitors said certificates of stock," etc. It will be noticed that, by the decree of April 26, 1899, appellee is given credit upon the \$15,000.00 note and interest for the full face of the notes guaranteed by him, which were executed by S. B. Barker & Co. to McElwee & Carney. The contention of the appellant bank is, that appellee, Hines, under his guaranty of the Barker notes, did not pay to McElwee & Carney the full amount of said notes, but paid an amount largely less than the amount of principal and interest due by the terms of the notes. The appellant charges, that the appellee, instead of paying \$16,426.06 and interest upon the Barker notes, only paid \$1000.00 therefor, and that, therefore, the decree in favor of the bank against him for the amount of the \$15,000.00 note and interest should only be credited with \$1000.00. The decree finds, that the excess of the amount due upon said \$15,000.00 note over the amount due to appellant upon the Barker notes, at the date of the filing of the bill, is the sum of \$217.93, whereas under the theory of appellant the amount of this excess would be largely above \$217.93.

Upon a careful examination of the record we find that this question in regard to the amount, which appellee paid upon the Barker notes, was in the record, and before the superior court, and the Appellate Court, and this court, when the cause was heard the first time.



The prayer of the original bill is as follows: "That upon the payment by your orator to said bank or to said Barker, whichever may be entitled thereto, of such sum as may be due upon said \$15,000.00 note in excess of the amount due to your orator upon the notes so as aforesaid paid by him to said McElwee & Carney under your orator's said guaranty, payment of which excess and of any other sum or sums of money whatever which this court may decree is due or owing from your orator to said bank and said Barker or either of them in the premises, your orator now here offers to make and tenders, the said certificates of stock shall be delivered to your orator to be and become and remain his sole and exclusive property, to be delivered by said bank to your orator." The notes, referred to in the prayer of the bill by the use of the words, "the notes so as aforesaid paid by him," are the notes amounting to \$16,426.06 above referred to. The bill alleges "that upon the maturity of said notes complainant (appellee) was obliged to and did under his said guaranty take up said notes and make payment to said McElwee & Carney; \* \* \* that McElwee & Carney thereupon endorsed said notes 'without recourse,' and delivered same to complainant; that, since the payment of the notes, Hines has been and is now the owner and holder thereof." The bill, as it thus appears, alleges that appellee took up and paid these notes. This court found, upon the former decision of the case, that the allegations of the bill were substantially proven upon the hearing. As the superior court was ordered by the Appellate Court to enter a decree in accordance with the prayer of the original bill filed by appellant, it could not do otherwise than enter the decree, which it did enter on April 26, 1899. We are, therefore, of the opinion that the decree follows the mandate of the Appellate Court, issued in accordance with the judgment of that court, which was affirmed by this court.

Where a case has been tried in this court, or the Appellate Court, and remanded with specific directions to do some act, the court below has no power to do anything but to carry out the specific directions. (*People v. Gibbons*, 161 Ill. 510; *Boggs v. Willard*, 70 id. 315). The contention, that appellee did not pay to McElwee & Carney more than \$1000.00 for the Barker notes, was made upon the former hearing, and fully argued and discussed both in the original briefs and in the petition for rehearing. Upon this question appellant has had its day in court. If the defense it made was unsuccessful, it was its misfortune; but the fact, that it made a bad and insufficient defense, does not give it the right to have the cause remanded for the purpose of affording it an opportunity to hunt up a better defense. Sound public policy demands that there shall be an end to litigation. (*Street v. Chicago Wharfing and Storage Co.* 157 Ill. 605).

It is also claimed, that there was a partial failure of consideration of the notes executed by S. B. Barker & Co. to McElwee & Carney, amounting to about \$1700.00, and that this sum of \$1700.00 or thereabouts should have been deducted from the amount of the credit, allowed to the appellee upon the \$15,000.00 note, or the decree therefor. The same answer to this contention may be made, as has already been made in regard to the payment of \$1000.00 only for the Barker notes. The briefs, filed upon the former hearing, show that this point in regard to a partial failure of consideration was then made. Such failure of consideration was not set up in the pleadings; and defendant cannot avail himself of a matter of defense which is not stated in his answer. (*Johnson v. Johnson*, 114 Ill. 611). It is conclusively shown, however, by the evidence appearing in the record that, even if allowance was made for this partial failure of consideration, appellee would have been entitled to the full amount of the credit which was given him by the terms of the decree.

Both the contentions now made by the appellant, as they are above stated, were presented upon the former hearing of the cause, and the disposition already made of them is final and amounts to *res judicata*.

The judgment of the Appellate Court, affirming the decree of the superior court rendered on April 26, 1899, is affirmed.

*Judgment affirmed.*

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ELIZABETH BOYD *et al.*

v.

THE CITY OF CHICAGO.\*

*Opinion filed October 19, 1900.*

This case is controlled by the decision in *Kuester v. City of Chicago*, (*ante*, p. 21.)

WRIT OF ERROR to the County Court of Cook county; the Hon. P. H. SANFORD, Judge, presiding.

GEORGE W. WILBUR, for plaintiffs in error.

CHARLES M. WALKER, Corporation Counsel, ARMAND F. TEEFY, and WILLIAM M. PINDELL, for defendant in error.

Per CURIAM: The above case, and the four cases decided with it, are writs of error to the county court of Cook county to reverse judgments affirming special assessments for the improvement of streets in the city of Chicago. In all material respects these cases are like the case of *Kuester v. City of Chicago*, (*ante*, p. 21,) and on the authority of that case and others therein cited the judgments of the county court must be reversed and the causes remanded.

*Reversed and remanded.*

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\*With this case are decided Nos. 946, *Martin v. City of Chicago*; 954, *Ingalls v. Same*; 961, *Haines v. Same*; and 850, *Betcher v. Same*.

## TOBIAS WANACK

v.

THE PEOPLE, for use of Dora Alexander *et al.**Opinion filed October 19, 1900.*187 116  
215 98

1. **FORMER RECOVERY**—*judgment against saloon-keeper and owner of building does not bar suit against surety.* A judgment against a saloon-keeper and the owner of the building, recovered in an action under section 5 of the Dram-shop act, is no bar to a suit against the saloon-keeper's bondsman, under section 9 of that act, unless actual satisfaction has been received.

2. **DRAM-SHOPS**—*when declaration against a saloon-keeper's surety is complete.* A declaration against the surety on a saloon-keeper's bond, which counts upon the injury to the plaintiff's means of support, is complete without making any reference to the proceedings and judgment in a former action against the saloon-keeper and the owner of the building.

3. **SAME**—*effect, as evidence, of judgment against a saloon-keeper and owner of building.* A judgment against a saloon-keeper and the owner of the building, recovered under section 5 of the Dram-shop act, is *prima facie* evidence as to the amount of damages in a suit against the saloon-keeper's surety, especially if the latter had notice of that suit and an opportunity to defend; nor is the effect of that judgment as evidence affected by the fact that exemplary damages are recoverable under section 5, since it will not be presumed that such damages were awarded.

4. **EVIDENCE**—*when admission of oral evidence to explain judgment is harmless.* In an action against the surety on a saloon-keeper's bond, where a judgment recovered against the saloon-keeper and the owner of the building, under section 5 of the Dram-shop act, is offered on the question of damages, the admission of testimony that no exemplary damages were claimed in that suit is harmless.

5. **APPEALS AND ERRORS**—*when defendant cannot question sufficiency of proof of damages.* The sufficiency of the proof of damages assessed against a defendant by the court upon default cannot be questioned by him in a court of review, in the absence of a motion in the trial court to set aside the assessment and an exception to that court's action in denying the motion.

*Wanack v. People*, 87 Ill. App. 371, affirmed.

**APPEAL** from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Christian county; the Hon. WILLIAM M. FARMER, Judge, presiding.

This suit was begun in the circuit court of Christian county by the People, etc., for the use of appellees, the widow and children of John Alexander, deceased, against appellant, as surety on the dram-shop bond of one Charles L. Wanack.

The declaration sets forth the bond sued upon, which was executed on September 21, 1896, conditioned according to the provisions of section 5 of the Dram-shop act, in the usual form of such bond. It is therein averred that the defendant Charles L. Wanack, after the execution and delivery of the bond, obtained from the city council of the city of Taylorville a license to keep a dram-shop; that on the first day of December, 1896, and at divers other times between that time and the 12th of February, 1897, and particularly on the 11th of that month, at his place of business where he was keeping said dram-shop, defendant sold, furnished and gave to John Alexander intoxicating liquors, by reason of which selling, furnishing and giving, he, the said John Alexander, on the 11th day of February, 1897, became intoxicated, in consequence of which he fell from his wagon and was killed, leaving the said Dora Alexander, his widow, and Homer, Cocoa, Ora and Merle Marie Alexander, his children, who were all, at the time of said death, residing with him as members of his family, and who, by the death of the said John Alexander, were then and there injured in their means of support. It is then averred that afterwards the widow and children brought a suit against Wanack, impleaded with one William Sanders, Cedora Sanders and Peter Michels, in an action on the case, setting forth in detail the proceedings in that suit, from which it appears that it was dismissed as to William and Cedora Sanders and proceeded to final judgment against Charles L. Wanack, the saloon-keeper, and Peter Michels, the owner of the building and premises in which the intoxicating liquors were sold, the judgment being for \$2000 and costs of suit.

Then follows an averment as to the identity of persons in that suit and this, so far as they are identical, and that the defendant in this suit had knowledge of the pendency of that suit and assisted in the defense; that plaintiffs paid out certain moneys for costs and attorney fees, and concludes: "By means of which premises the plaintiffs have sustained damages to the amount of \$3000, yet said defendant has not paid the sum or any part thereof, nor has the said Charles L. Wanack or the said Peter Michels paid said judgment or any part thereof, but that the said judgment still remains unpaid and unsatisfied, whereby, and by force of the statute in such case made and provided, an action has accrued to the plaintiffs to demand of said defendant, for the use aforesaid, the sum of \$3000 as their debt and the further sum of \$3000 as their damages," etc.

To this declaration the defendant interposed a general demurrer, which being overruled, he filed several pleas, but afterwards withdrew the same and elected to stand by his demurrer to the declaration. Thereupon judgment *nil dicit* was entered, to which the defendant excepted, and the court, having heard the evidence, assessed the plaintiffs' damages at \$2000, and entered a judgment in favor of the plaintiffs for \$3000 debt, (the amount of the bond,) to be discharged on the payment of \$2000 damages. The evidence introduced was the proceeding and judgment in the action set up in the declaration, and the testimony of one of the attorneys in that suit to the effect that no exemplary damages were claimed in that action.

RUFUS M. POTTS, and HOGAN & DRENNAN, for appellant:

Under the Dram-shop act, as shown by sections 5 and 9, there are two kinds of actions. Either may be pursued, but pursuing one is an election and waiver of the other. 7 Ency. of Pl. & Pr. sec. 4, p. 364; 1 id. pp. 148, 183.

A single cause of action cannot be split, in order that separate suits may be brought for various parts of what really constitutes one demand. 1 Ency. of Pl. & Pr. 148; *Brewster v. Chastine*, 9 Ill. App. 57; *Vandusen v. Pomeroy*, 24 Ill. 291; *Keeler v. Campbell*, id. 289.

Two distinct causes of action cannot be set up in a declaration, and where such facts exist a demurrer should be sustained. *Railway Co. v. Hill*, 29 Ill. App. 582.

Oral evidence cannot be received to establish what elements enter into and constitute a judgment, or the amount thereof. The record itself is the only evidence of the judgment. *McGuire v. Goodman*, 31 Ill. App. 421; *Moore v. Bruner*, id. 404.

Bonds are strictly construed in favor of the sureties. *Crego v. People*, 36 Ill. App. 413; 20 Am. & Eng. Ency. of Law, 460; *Bartell v. People*, 38 Ill. App. 436.

The Dram-shop act is highly penal, and is strictly construed. *Freese v. Tripp*, 70 Ill. 496; *Meidel v. Anthis*, 71 id. 241.

J. C. & W. B. McBRIDE, and FRANK P. DRENNAN, for appellees:

A default admits the material allegations in a declaration, and the only question remaining for trial is the amount of damages. *Cook v. Skelton*, 20 Ill. 107.

Where a judgment is rendered in favor of plaintiff on demurrer to declaration, in default of plea the defendant is so far out of court as to be entitled to cross-examine witnesses for the purpose of reducing damages only, and it is not admissible for him to make any defense to the action. *Binz v. Tyler*, 79 Ill. 248.

At common law, before suit would lie against a surety on a bond it was necessary to first establish a breach of the bond by instituting a suit against the principal and prosecuting it to final judgment. (*People v. Wilson*, 1 Scam. 83; *Biggs v. Postlewait*, Breese, 198; *Seeley v. Evans*, 19 Wend. 459.) But in the State of Illinois the statute has made

provision whereby suits may be instituted and prosecuted against the principal and surety at the same time, as to official bonds of public officers, executors, administrators, guardians and conservators. Starr & Cur. Stat. chap. 103, par. 13; *Nelson v. People*, 59 Ill. App. 469; *McIntyre v. People*, 103 Ill. 142; *Tucker v. People*, 87 id. 76.

The practice of first suing the principal, and thus establishing the breach, and then suing the surety on a dram-shop bond, is concurrent with the practice of suing all together, where there is a statute allowing them to be sued together. *Brandt v. State*, 40 N. E. Rep. 682; *State v. Nutter*, 30 S. E. Rep. 67; *Gullickson v. Jorud*, 89 Mich. 8.

A judgment against a principal is at least *prima facie* against the surety. 12 Am. & Eng. Ency. of Law, 98.

Where a person is responsible over to another, either by operation of law or by express contract, and he has had notice or has actual knowledge of the pendency of a suit involving the subject matter of the indemnity, he can no longer be regarded as a stranger to the suit; and any judgment, without fraud, against the party to be indemnified will be conclusive against the indemnitor, whether he has appeared or not. *Drennan v. Bunn*, 124 Ill. 175.

Mr. JUSTICE WILKIN delivered the opinion of the court:

The demurrer to the declaration being general, the principal question in the case is, does it state a good cause of action? The contention on behalf of the appellant that it does not is stated as follows: "That the bond set up and relied upon is the bond of Charles L. Wanack and not the bond of Peter Michels, and the judgment declared upon is a joint judgment against Charles L. Wanack and Peter Michels; and that the declaration also discloses that the judgment herein made the basis of a recovery was obtained under that section of the statute authorizing a remedy against the keeper of a dram-shop and the owner of the premises, (sec. 9,) and this suit is



based upon the section providing for bond, (sec. 5.)" It is also claimed that the evidence admitted after the default was incompetent because it was in reference to a judgment against Wanack and Michels "and at variance with the bond sought to be recovered upon, and that oral evidence cannot be properly admitted to explain, strengthen or contradict a judgment."

The proposition above stated as showing that the declaration was obnoxious to the demurrer is based upon the unwarranted assumption that the present action is upon the judgment against Charles L. Wanack and Michels. The suit is not based upon that judgment, but upon the cause of action which the statute gives to parties injured in their means of support by the sale of intoxicating liquors. For such an injury a remedy is given by the statute against several parties—the keeper of the dram-shop, the owner of the property and the sureties upon the dram-shop bond. It is well understood that an action against one or more of these is not a bar to a similar action against either of the others unless actual satisfaction has been received. Thus it is said by Judge Cooley in his work on Torts, speaking on the subject: "Whatever may have been the reason for proceeding at first against less than the whole, it is conceded on all sides that a previous suit against one or more is no bar to a new suit against the others, even though the first suit be pending or have proceeded to judgment when the second is brought. The second, or even a subsequent suit, may proceed until a stage has been reached in some one of them at which the plaintiff is deemed, in law, to have either received satisfaction or to have elected to rely upon one proceeding for his remedy to the abandonment of the others." Cooley on Torts, (2d ed.) top pp. 157, 158.

We concur in the view of the Appellate Court that this declaration is complete, as counting upon the injury to the plaintiffs' means of support, without reference to that part setting up the proceeding and judgment in the

action against the keeper of the dram-shop and the owner of the premises. The only effect that that judgment can have upon the present suit is as to the measure of damages. The rule seems to be well settled that a judgment against the principal, upon official bonds and bonds by parties to suits, and proceedings in court or relating to the result of a suit or proceeding, is conclusive upon the surety. Whether or not the same rule applies in suits upon bonds like the one here involved the authorities are not altogether harmonious; but we think the weight of authority and sound reasoning is in favor of the proposition that a judgment against the principal, especially where the surety has been notified and had an opportunity to defend, is *prima facie* evidence as to the amount of damages in a suit against the surety. (*State v. Martin*, 20 Ark. 629; *Webs v. State*, 4 Cold. 199; *Comstock v. Deohan*, 8 Hun, 373; *Berger v. Williams*, 4 McLean, 577; *Drummond v. Prestman's Exrs.* 12 Wheat. 515.) Brandt, in his work on Suretyship, (sec. 524,) says: "Although there is a conflict of authority on the subject, it seems to be the better opinion that, except in cases where, upon the fair construction of the contract, the surety may be held to have undertaken to be responsible for the result of a suit, or when he is made privy to the suit by notice and the opportunity being given him to defend it, a judgment against the principal alone is, as a general rule, evidence against the surety of the fact of its recovery only, and not of any fact which it was necessary to find in order to recover such judgment." In this case the allegation is not only that the surety was notified of the pendency of the suit against the principal, but that he actually appeared and aided and assisted in the defense.

The fact that in the former suit exemplary damages could have been recovered, whereas in this suit on the bond only compensatory damages can be awarded, in no way affects the binding force of that judgment as *prima facie* evidence on this demurrer to the declaration. While

it is true that by force of the statute, as well as under the decisions of this court, in an action under section 9 of the Dram-shop act a plaintiff may recover exemplary damages, having first proved actual damages, punitive damages are only recoverable where there are some aggravating circumstances connected with the case to warrant it; and we are not to indulge the presumption that such damages are allowed in every case, but, on the contrary, so far as presumptions may be indulged, it must rather be assumed, in the absence of some showing to the contrary, that only actual damages were awarded. Certainly, the surety on the bond would have had a right, under proper pleas, to show any fact tending to reduce the amount of that judgment; and even upon this default we see no reason why he might not have offered such proof if he had seen proper to do so. What we have said as to the effect of the former judgment has been more with a view to the competency of it in evidence than as a material part of the declaration.

While a default admits every material allegation of the declaration it does not admit the amount of damages, and as we understand this record, the evidence introduced by the plaintiff was upon the assessment of the damages.

The foregoing sufficiently disposes of the objection to the competency of the former judgment, and also shows the sufficiency of that evidence to establish the plaintiff's damages *prima facie*. The oral evidence as to the fact that exemplary damages were not claimed in that action, was, to say the least, harmless as affecting the rights of defendant. Nor is defendant in a position, on this record, to question the sufficiency of the proof of damages. In *Motsinger v. Coleman*, 16 Ill. 71, it was said: "Where the party is dissatisfied with the amount of damages assessed upon a writ of inquiry, or by the court or clerk upon a default, the proper practice is to file affidavits showing all the evidence heard upon the writ

of inquiry, and ask that the inquest be set aside and a new writ of inquiry be issued, or that the inquest and default be both set aside and the party let in to make his defense." And again, in the same volume, in the case of *Chicago and Rock Island Railroad Co. v. Ward*, (at p. 526,) it is said: "There are two questions: First, how shall a party review the proofs and instructions on the inquest of damages, and is the case properly presented; and second, what is the true measure of damages. The mode of presenting the first was laid down in *Motsinger v. Coleman*, 16 Ill. 71, to be by presenting the proofs and instructions, by affidavit or otherwise, to the circuit court and moving to set aside the inquest, and preserving the same in the record by bill of exceptions. Such was the view of the court in *Morton v. Bailey*, 1 Scam. 213, and that no exception on the inquest itself would be sufficient without a subsequent motion.—See *Gillet v. Stone*, 1 Scam. 539." In the still later case of *McCord v. Mechanics' Nat. Bank of Chicago*, 84 Ill. 49, we said: "It is also insisted, that on the assessment of damages the proof was not sufficient; that the signature to the guaranty was not proven, etc. This position cannot be sustained. The special plea having been set aside by demurrer, the execution of the note and of guaranty stood confessed of record and needed no proof. Again, where the assessment of damages is not supported by adequate proof, such position can only be heard in this court in cases where a motion in the court below has been made to set aside the assessment of damages and an exception taken to the judgment of the circuit court in overruling such motion. On this record the question cannot be raised in this court."

We are satisfied there is no reversible error in the judgments of the circuit and Appellate Courts. The judgment of the latter will accordingly be affirmed.

*Judgment affirmed.*

THE PEOPLE *ex rel.* Ocean Accident and Guarantee Corp.

v.

JAMES R. B. VANCLEAVE.

*Opinion filed October 19, 1900.*

187	125
j207	876
187	125
214	282
118a	607

1. **INSURANCE**—*clause 6 of section 2 of Casualty Companies act of 1899 construed.* Clause 6 of section 2 of the act concerning casualty companies, (Laws of 1899, p. 238,) providing that the declaration of intention to form a corporation shall state the kinds of insurance to be transacted, which "may include such kinds \* \* \* as are specified under subdivisions 1 and 2 of section 1 hereof, *or* under subdivisions 3, 4, 5, 6 and 7 of section 1," does not imply that companies electing to transact the kinds of insurance specified in subdivisions 1 and 2 shall not transact the kinds specified in subdivisions 3, 4, 5, 6 and 7, since the word "*or*" must be construed to mean "*and*."

2. **SAME**—*right of casualty company to combine all kinds of insurance specified in act of 1899.* A corporation, domestic or foreign, which has been licensed to do business in this State under subdivisions 3, 4, 5 or 6 of section 1 of the Casualty Companies act of 1899, may, upon complying with the statutory formalities, combine therewith the business specified in subdivisions 1 and 2 of such section.

BOGGS, C. J., and CARTER, J., dissenting.

ORIGINAL petition for *mandamus*.

This is an original petition, filed in this court at the June term, 1900, by the People upon the relation of the Ocean Accident and Guarantee Corporation, Limited, a foreign corporation, organized and existing under an act of parliament of the kingdom of Great Britain and Ireland, asking for a writ of *mandamus*, commanding the defendant, the State Insurance Superintendent, to grant and issue to the petitioner a license to transact in the State of Illinois all of the six lines of insurance set forth in subdivisions numbered from 1 to 6 inclusive of section 1 of "An act to incorporate and to govern casualty insurance companies, and to control such companies of this State and of other States doing business in the State of Illinois, and providing and fixing the punishment for violation of the provisions thereof, and to repeal all laws

now existing which conflict therewith," approved April 21, 1899, in force July 1, 1899. (Laws of Ill. 1899, p. 237). The defendant has interposed a demurrer to the petition.

The above entitled act of April 21, 1899, so far as it is necessary to set the same forth in order to understand the questions raised by the demurrer to the petition, is as follows:

"Sec. 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That any number of persons not less than thirteen, may, in the manner hereinafter prescribed, form a corporation for the purpose of issuing policies for any of the following kinds of insurance business:

"*First*—Insuring any person against bodily injury, disablement or death resulting from accident, and providing benefits for disability caused by disease.

"*Second*—Insuring against loss or damage resulting from accident to, or injury suffered by, an employee or other person for which accident or injury the person insured is liable.

"*Third*—To guarantee or indemnify merchants, traders and all others engaged in business and giving credit therein from loss or damage by reason of giving or extending credit to their customers.

"*Fourth*—Against loss by burglary or theft, or both.

"*Fifth*—Upon glass against breakage.

"*Sixth*—Upon steam boilers and pipes, engines and machinery connected therewith or operated thereby; against explosion and accident and loss or damage to life or property resulting therefrom and to make inspection of and to issue certificates of inspection upon such boilers and pipes, engines and machinery; also upon elevators and machinery forming a part thereof and to make inspection and to issue certificates of inspection upon the same.

"*Seventh*—Against any other casualty or insurance risk specified in the article of organization, which may

lawfully be the subject of insurance and the formation of corporation for insuring against which is not otherwise provided for by these statutes.

"Sec. 2. Such persons shall make, sign, acknowledge and file in the office of the insurance superintendent a declaration of their intention to form a company under the provisions hereof, which declaration shall contain a copy of the charter proposed to be adopted by them, which charter shall state:

"*First*—The name of the corporation and the place where the principal office for the transacting of business shall be located.

"*Second*—The amount of capital stock, the number of shares thereof and the amount of each share.

"*Third*—The designation of the general officers and the number of directors or trustees.

"*Fourth*—The mode and manner of electing directors or trustees, filling vacancies in their number and their term of office.

"*Fifth*—The period for the commencement and termination of their fiscal year.

"*Sixth*—That they associate for the purpose of transacting the business of casualty insurance, stating the nature and kind thereof, which may include such kinds of business as are specified under subdivisions 1 and 2 of section 1 hereof, or under subdivisions 3, 4, 5, 6 and 7 of section 1 hereof, and that no policy shall embrace more kinds of insurance than are specified in one of the subdivisions named in section 1 of this act. \* \* \*

"Sec. 3. No such corporation for any of the purposes specified in this act shall do business with a capital stock of less than \$100,000.00 fully paid in in cash, with an additional \$50,000.00 fully paid in cash for every kind of insurance, more than one, which it is authorized to do: *Provided*, that it may not do the business named in subdivision 2 of section 1 hereof on a capital of less than \$200,000.00 fully paid in in cash. \* \* \*

"Sec. 7. Any casualty insurance corporation organized under the laws of any other State or foreign country may be admitted to transact business in this State by filing with the insurance superintendent for his approval, the following documents and papers:

*"First*—An application for license to do business in this State, setting forth the full name of the corporation, the location of its principal office of business, and, separately, the several kinds of business to be transacted. \* \* \*

*"Second*—A certificate of deposit from the State official, having the custody of the securities showing to the satisfaction of said insurance superintendent that the corporation has the amount of funds required by this act to be deposited by companies incorporated in this State invested in securities deposited with the superintendent of the insurance department, State Treasurer or other proper officer of the State in which it is incorporated, if incorporated in the United States, and if a foreign corporation, then in some one of the States of the United States. \* \* \*

*"Third*—A duly certified copy of its charter and by-laws together with a certificate from the insurance superintendent or other proper officer of the State wherein incorporated, that the corporation is duly organized and licensed to transact the business of casualty insurance in such State, stating separately the different kinds of insurance as provided in section 1 of this act. \* \* \*

*"Fourth*—*A complete statement of the financial condition of the corporation.*] All such corporations admitted to transact business in this State must comply with the laws governing like corporations organized under the laws of this State, except that such corporations as are at the date of the passage of this act admitted to transact in this State more than four of the kinds of business named in subdivisions of section 1 hereof, may continue such business on a capital of not less than \$200,000.00, and all



such corporations and all persons acting as agents thereof shall be subject to the same penalties prescribed by these statutes relating thereto for a violation of any of the provisions thereof and to the same methods for the enforcement of such penalties. The said company shall apply annually to the insurance superintendent for a certificate for each of its agents to do business in this State."

It is alleged in the petition that, in and by its charter, petitioner is authorized to transact a general insurance business, including the various lines of insurance named in subdivisions from 1 to 6 inclusive of section 1; that in April, 1898, petitioner filed with the defendant application for license to enter into and transact lines of business in Illinois, known as credit insurance, being the line of insurance mentioned in subdivision 3 of section 1, as above set forth, in accordance with the laws of Illinois; that petitioner in all other respects did comply with the laws of Illinois concerning the issuance of said license; that defendant issued to petitioner a license to transact in Illinois the business of credit insurance; that petitioner complied with the laws of Illinois in regard thereto, and entered upon said business within this State, and has continued to transact the same ever since; that petitioner afterwards in April, 1899, made application to defendant, as State Insurance Superintendent, for license to transact all said lines of insurance mentioned in said subdivisions from 1 to 6 inclusive of said section 1, and filed with the defendant all papers made necessary by law for the obtaining of such license; that petitioner was informed by defendant, that it was the ruling of the insurance department of the State of Illinois, that, under the laws of the State, no license could be granted to any one company to do all of the aforesaid lines of insurance, and that no insurance company, licensed to transact the lines of business prescribed in subdivisions 1 and 2 as above set forth, could be licensed to transact any of the others, and that no company, licensed to transact any of the

said other lines, could be licensed to transact any of the lines of business named in said subdivisions 1 and 2; that, in March, 1900, petitioner again applied to defendant for license to transact in Illinois all of the lines of insurance in said subdivisions mentioned, and complied with the laws and prerequisites of the State of Illinois necessary for the transaction of casualty insurance, and filed all papers and documents required to that end, and tendered all fees required by said law for said license, but that defendant refused said license upon the alleged ground, that the statute of Illinois did not permit the issuing of a license to any one company to transact the lines of insurance named in said subdivisions 1 and 2 if the said company was transacting any of the lines of business mentioned in said subdivisions 3, 4, 5 and 6; that petitioner reluctantly and under protest accepted and received a license to transact in Illinois lines of insurance mentioned in said subdivisions numbered 3, 4, 5 and 6, but, nevertheless, insisted upon its right to have said license also include the lines of insurance mentioned in subdivisions 1 and 2, and demanded the issuance of a license covering all the lines of business; that defendant, for the reasons above stated, refused to grant the same; that afterwards, on May 14, 1900, petitioner again made application for license to transact in Illinois said lines of insurance business mentioned in said subdivisions 1 and 2, in addition to the lines of insurance business for the transaction of which the petitioner then held license as aforesaid; that petitioner filed all papers and documents required by section 7 of the statute above set forth, and tendered all lawful fees, but its application was again refused; the petitioner avers that the holding of the insurance department of the State of Illinois is not in accord with the proper meaning and construction of the statute, but that, under said statute, petitioner is entitled to receive a license to transact in Illinois all the lines of insurance business mentioned in said subdivision.

ALSCHULER & MURPHY, for the relator.

PERRY A. HULL, for the respondent.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

It is conceded, that the petitioner has the right to transact in Illinois the business of credit insurance, burglary insurance, glass insurance and boiler and elevator insurance as specified in the third, fourth, fifth and sixth subdivisions of section 1 of the act of April 21, 1899, as set forth in the statement preceding this opinion. The object, sought by the application for the present writ of *mandamus*, is to compel the defendant to issue a license to the petitioner to transact the business of insurance against bodily accident and employer's liability, as specified in subdivisions 1 and 2 aforesaid, in addition to the four lines of insurance business, which it is already licensed to transact.

The defendant, as State Insurance Superintendent, holds that, under the sixth paragraph of section 2 of said act, neither credit indemnity, as described in subdivision 3, nor any of the other branches of business, subsequently enumerated in subdivisions 4, 5, 6 and 7, can be combined with the business of accident insurance and employer's liability insurance as specified in subdivisions 1 and 2 of section 1. The question for determination is, whether a foreign corporation, which has been licensed to do business in this State under said subdivisions 3, 4, 5 and 6 of section 1 of the act, can join thereto and combine therewith the kinds of business mentioned in subdivisions 1 and 2 of said section 1. In other words, there is here presented for construction the meaning of the following words in subdivision 6 of section 2 of the act, to-wit: "Which may include such kinds of business as are specified under subdivisions 1 and 2 of section 1 hereof, or under subdivisions 3, 4, 5, 6 and 7 of section 1

hereof." The defendant holds, that the first and second subdivisions of section 1 constitute one group, and the remaining subdivisions constitute another group; and that no company can be organized in this State to transact the kinds of business embraced in more than one of said groups; that is to say, that a company, organized to do the business of the subdivisions or any one of them named in group 1, cannot transact any of the business named in the subdivisions of group 2, and *vice versa*; and the department further holds, that the same rule is applicable to foreign companies, not excepted by the act itself.

The contention of the defendant, as above set forth, is based upon the fact, that the word, "or," is used in that portion of subdivision 6 of section 2, which is above quoted. Section 2 requires the making, signing, acknowledging and filing in the office of the insurance superintendent a declaration of intention to form a company under the provisions of the act, and requires that such declaration shall contain a copy of the charter proposed to be adopted, and then proceeds to specify what said charter shall state. The sixth statement, required to be made by the charter, is that the corporators "associate for the purpose of transacting the business of casualty insurance, stating the nature and kind thereof, which may include such kinds of business as are specified under subdivisions 1 and 2 of section 1 hereof, or under subdivisions 3, 4, 5, 6 and 7 of section 1 hereof." The language of subdivision 6 of section 2, as thus quoted, is not positive or restrictive in its terms, but is simply permissive. There is therein no positive prohibition against companies engaging in all the different kinds of business specified in section 1.

Certainly, no considerations of public policy or business judgment suggest such a classification as is here contended for. It is not apparent why a corporation, authorized to write credit or burglary insurance should

be permitted to write insurance on glass or boilers, and against accident from explosions, and yet be prohibited from writing insurance against bodily accident, or employer's liability. It is not apparent why a company, doing a boiler or elevator insurance, can combine insurance on plate glass, credits and burglary, while a company, doing personal injury and employer's liability business, can combine with its business none of the above suggested lines.

In view of these considerations, and of the language used in the enacting clause of section 1 of the act, and in other parts of the act, it is clear that the word "or" in subdivision 6 of section 2 must be construed to mean "and."

Sutherland, in his work on Statutory Construction, (sec. 252,) says: "The popular use of 'or' and 'and' is so loose and so frequently inaccurate that it has infected statutory enactments. While they are not treated as interchangeable, and should be followed when their accurate reading does not render the sense dubious, their strict meaning is more readily departed from than that of other words, and one read in place of the other in deference to the meaning of the context."

"In order to effectuate the intention of the testator or legislature, the word 'and' is sometimes considered to mean 'or,' and *vice versa*." (2 Am. & Eng. Ency. of Law, —2d ed.—p. 333).

In *Boyles v. McMurphy*, 55 Ill. 236, this court had under consideration the meaning of the word, "or," as used in the dower statute of the State which was then in force; and it was there held, that the eleventh section of that statute, which declared the effect of the renunciation of the will to be, that "such widow shall thereupon be entitled to dower in the lands *or* share in the personal estate of the husband," was not to be construed as confining the widow to a right to dower in the lands *or* her share in the personalty, the one *or* the other, the tenth section having provided that she may elect "to take her dower

in the lands *and* her share in the personal estate of her husband." In *Boyles v. McMurphy*, *supra*, we said (p. 239): "Without stopping to define the precise significance of the disjunctive conjunction, 'or,' as used in this provision of the statute, we are well satisfied, that a true construction does not give to it the alternative sense contended for by plaintiffs' counsel, of an option to the widow to take only the one or the other, dower, or share in the personal estate, but that she may not take both together. We think she is entitled to both, in this case, and that the court below rightfully adjudged to her dower." (See also *Blemer v. People*, 76 Ill. 265; *Newland v. Marsh*, 19 id. 376).

The first or enacting clause of section 1 provides, "that any number of persons not less than thirteen, may, in the manner hereinafter prescribed, form a corporation for the purpose of issuing policies for any of the following kinds of insurance business." Then follow descriptions of the six kinds of insurance business, to transact which license is demanded by the petitioner. The persons specified, not less than thirteen in number, are authorized, not to form *corporations* for the purpose of issuing policies for "any of the following kinds of insurance business," that is to say, to form a separate corporation for the purpose of issuing policies for each of such kinds of insurance business; but such persons are authorized to form *a corporation* for the purpose of issuing policies for "any of the following kinds of insurance business." "Any," as here used, means "all" or "every." In *People v. Fidelity and Casualty Co.* 153 Ill. 25, we said: "The expression 'any kind of insurance' will apply to all kinds of insurance." Bouvier, in his Law Dictionary, says that the word "any" is given the full force of "every" or "all." (*Logan v. Small*, 43 Mo. 254; *McMurray v. Brown*, 91 U. S. 257; *Davidson v. Dallas*, 8 Cal. 227; *Overseers of Manchester v. Guardians of St. Pancras*, 4 Q. B. Div. 409; *County of Chicot v. Lewis*, 103 U. S. 164). "The word 'any' is frequently used in the sense of 'all' or 'every,' and when thus used has a very

comprehensive meaning." (2 Am. & Eng. Ency. of Law,—2d ed.—p. 414).

The enacting clause of section 1 of the act authorizes the formation of a corporation for the purpose of issuing policies for every or all of the kinds of insurance business mentioned in section 1. According to the construction given to the act by the defendant, the word "any," as used in section 1, cannot mean "either," because it is admitted that license may issue to one company to do the two kinds of insurance business mentioned in subdivisions 1 and 2, or to do the four kinds of insurance business mentioned in subdivisions 3, 4, 5 and 6. This construction negatives the giving of any other meaning to the word "any" than that it refers to more than one. If the corporation may issue policies for "any" of the kinds of insurance business named in the section, then it may as well issue such policies for all of such kinds of business as for any number of the same greater than one. The language, used in the subdivision or paragraph 6 of section 2, must be construed in connection with the language of the first or enacting clause of section 1, and, when so construed, the word "or" can have no other meaning than the word "and."

Section 6 provides, "that no policy shall embrace more kinds of insurance than are specified in one of the subdivisions named in section 1 of this act." This prohibition is against the issuance of a policy by the company, which shall embrace more than one kind of insurance, but does not necessarily contain any limitation of the right of the company to issue policies for all the kinds of insurance named. On the contrary, the restriction of each policy to one kind of insurance, as named, implies and involves the right to issue a number of policies, provided only that each shall be for a different kind of insurance.

Again, section 3 provides, that "no such corporation for any of the purposes specified in this act shall do business with a capital stock of less than \$100,000.00, fully

paid in in cash, with an additional \$50,000.00 fully paid in cash for every kind of insurance, more than one, which it is authorized to do." This language implies the authority of the company to do more than one kind of insurance business, provided it pays in in cash an additional \$50,000.00 for each kind. The language thus quoted from section 3 contains no limitation as to the number of kinds of insurance business which may be transacted. Authority is evidently given to do all of the kinds of insurance business named in section 1, provided only an additional \$50,000.00 of capital stock is paid in in cash for each kind of insurance business so transacted.

The language, contained in paragraph 4 of section 7 in regard to foreign insurance companies, which refers to such corporations as are at the date of the passage of the act admitted to transact in this State more than four of the kinds of business named in said subdivisions of section 1, contains no implication that such corporations are forbidden to transact more than four kinds of business, but merely requires that, where they did transact more than four kinds of insurance business before the passage of the act, they shall only be required to continue their business on a capital of not less than \$200,000.00. By the terms of section 3, requiring an additional \$50,000.00 to be fully paid in cash for every kind of insurance business more than one which is authorized to be done, the capital required might be largely in excess of \$200,000.00. Section 4 was merely designed to relieve such foreign companies from increasing the capital to more than \$200,000.00 in the cases therein specified.

Our construction of the act is, that domestic companies, or companies organized under the act of April 21, 1899, are authorized to transact all of the kinds of insurance business mentioned in section 1. If this is true in regard to domestic companies, it must be true also in regard to foreign companies, because, under the repeated decisions of this court, foreign corporations are placed



upon an equal footing with domestic corporations. The general statute, which requires that foreign corporations shall have no other or greater powers than domestic corporations, contains a direct implication that such foreign corporations shall have equal powers with domestic corporations of like character. The purpose of our statute is to produce uniformity in the powers, liabilities, duties and restrictions of foreign and domestic corporations of like character, and to bring them all under the influence of the same law. (*Stevens v. Pratt*, 101 Ill. 206; *Santa Clara Female Academy v. Sullivan*, 116 id. 375; *Barnes v. Suddard*, 117 id. 237; *Granite State Provident Ass. v. Lloyd*, 145 id. 620; *Pennsylvania Co. for Insurance on Lives v. Bauerle*, 143 id. 459).

For the reasons above stated, an order will be entered directing the issuance of the writ of *mandamus* as prayed for in the petition herein filed.

*Writ ordered.*

BOGGS, C. J., and CARTER, J., dissenting.

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THE ECONOMY LIGHT AND POWER COMPANY

v.

JOSEPH STEPHEN, Admr.

*Opinion filed October 19, 1900.*

INSTRUCTIONS—*instruction in an action for death construed.* An instruction authorizing a recovery if the jury believe plaintiff's intestate was using due care; that his death was caused by defendant's negligence; that he left a wife and children, and that they "have been and are deprived of their means of support," is not open to the objection that it bases a right of recovery upon the pecuniary condition of the widow and next of kin, or that it is an instruction as to the measure of damages, and, as such, erroneous.

*Economy Light and Power Co. v. Stephen*, 87 Ill. App. 220, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Will county; the Hon. JOHN SMALL, Judge, presiding.

GARNSEY & KNOX, for appellant.

DONAHOE & McNAUGHTON, for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

Appellee recovered a judgment for \$5000 in the circuit court of Will county against the appellant, as damages for negligently causing the death of his intestate, Frank Duffy. The action was brought under the provisions of chapter 70 of our statutes, for the benefit of Margaret Duffy, widow, and Margaret and Catharine Duffy, minor children and next of kin to said intestate. That judgment has been affirmed by the Appellate Court, and hence this appeal.

The suit was brought against appellant, and Harry B., H. Fred and Horace Humphrey, known as Humphrey & Sons. The light and power company was engaged in the business of generating electricity and furnishing the same to customers for lighting and other purposes in the city of Joliet. Humphrey & Sons were foundrymen, and the deceased, Duffy, was in their employ. The light and power company furnished electric light for the foundry building, but the wires and fixtures belonged to Humphrey & Sons. Duffy was killed by coming in contact with a wire in the foundry building overcharged with electricity, the allegation in the declaration being that the wire became so overcharged through the negligence of the light and power company in using a transformer so out of repair as to permit a high and dangerous current to pass through it and over the wires to the lamps in the foundry building, and that Humphrey & Sons used inferior and defective wires and permitted the same to become and remain out of repair. Both defendants pleaded the general issue.

In the instructions to the jury they were directed to return a verdict in favor of the Humphreys, and the issue was submitted as to the light and power company alone, under instructions as to the law of the case, with the re-

sult above stated. No further question is made as to the liability of Humphrey & Sons. The only question in the case between these parties going to the substantial merits is, whether or not the negligence of appellant, as charged in the declaration, caused the death of Frank Duffy. A volume of evidence was submitted on that question, and it is conceded by all parties that it was conflicting. That fact, however, is no longer of importance except in determining whether the ruling of the court upon instructions was correct. No other question of law is raised upon this appeal.

But one instruction was asked or given on behalf of the plaintiff and none were refused which were asked for the defendant. The one given on behalf of the plaintiff is as follows:

"The court instructs the jury that if they believe, from the evidence, that on the 22d day of January, 1898, Frank Duffy came to his death, while in the exercise of ordinary care for his own safety, in the manner and by the means set forth in the amended declaration filed herein; and if the jury further believe, from the evidence, that the death of the said Frank Duffy was caused by the negligence of the defendant, Economy Light and Power Company, as charged in the declaration; and if the jury further believe, from the evidence, that the said Frank Duffy left him surviving a widow and children, as charged in the declaration, and that such widow and children, by the death of the said Frank Duffy, have been and are deprived of their means of support, then, in law, the plaintiff is entitled to recover."

It is urged on behalf of appellant that this instruction was calculated to mislead the jury, for two reasons: First, because, as is said, it bases a right of recovery upon the pecuniary condition of the widow and next of kin of deceased, after his death; second, that it is an instruction as to the measure of damages, and as such is erroneous. The law of the case as cited by counsel is not

questioned. It is undoubtedly true that the poverty or wealth of the next of kin is immaterial on the question of the amount of the recovery which may be had, under the statute, for wrongfully or negligently causing the death of a person; but we do not think that any intelligent jury would understand this instruction as laying down a contrary rule. To assume that the language, "have been and are deprived of their means of support," would be understood by the jury as referring to the pecuniary condition of the widow and children of the deceased, or as authorizing the jury to base their verdict on any such condition, is, in our opinion, unwarranted. The second objection to the instruction is equally untenable. In the first place, the instruction does not purport to be an instruction as to the measure of damages. It simply tells the jury that if they find the facts to be as therein stated the plaintiff is entitled to recover. The amount of damages which could be recovered is in no way intimated. It is too well settled by our former decisions to be longer a controverted question, that the measure of damages in such cases is the pecuniary injury sustained by the widow and next of kin. But this instruction in no way contravenes that rule. We do not think it can be seriously contended that one who has been deprived of his means of support by the death of another does not thereby suffer pecuniary injury or loss. It may be that this single instruction does not, of itself, fully instruct the jury as to every principle of law applicable to the case; but the question here is, whether, standing alone, it is erroneous in its announcement of the rules of law applicable to the case or calculated to mislead the jury to the prejudice of the defendant. If other necessary instructions were not given or asked it was the fault of the defendant itself.

We think the Appellate Court was clearly right in holding that there was no reversible error in the giving of the first instruction. Its judgment will be affirmed.

*Judgment affirmed.*

LOU C. LURTON

v.

THE JACKSONVILLE LOAN AND BUILDING ASSOCIATION.

*Opinion filed October 19, 1900.*

1. LOAN ASSOCIATIONS—*when borrower is estopped to deny validity of loan.* One who bids for a loan at a specified premium, which bid is accepted and the money loaned in good faith, is estopped, after reaping the benefits of the transaction, to deny the validity of the loan on the ground that there was no competitive bidding.

2. USURY—*effect where advances for taxes, etc., draw usurious interest.* Where, by oversight in not erasing the rate of interest printed in an old blank form of mortgage, advances for taxes, insurance and assessments are made to draw usurious interest but the principal sum loaned draws legal interest, it is proper for the court, on foreclosure, to confine the effect of the usurious agreement to advances for those purposes.

*Lurton v. Jacksonville L. & B. Ass.* 87 Ill. App. 395, affirmed.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Morgan county; the Hon. ROBERT B. SHIRLEY, Judge, presiding.

GEORGE L. MERRILL, and J. J. REEVE, for appellant.

L. O. VAUGHT, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The circuit court of Morgan county entered a decree for the foreclosure of a mortgage executed by Lou C. Lurton, appellant, and William S. Lurton, her husband, to secure the payment of a promissory note made by her to the Jacksonville Loan and Building Association, appellee, on June 5, 1893, for \$5500, with interest at six per cent, payable weekly, upon \$4510. The consideration of the note was fifty-five shares of stock of the association subscribed for by her at a premium of eighteen per cent,

187	141
e98a	'145
d98a	'146

187	141
e190	'267

187	141
96a	'38

187	141
99a	'160

187	141
104a	'145

187	141
109a	'254

on which she received an advance of said sum of \$4510. The Appellate Court affirmed the decree.

A reversal is asked on three grounds: First, that the money was not put up to the highest bidder on the competitive plan and bid off by appellant, but that the directors arbitrarily fixed the premium which she was required to bid in order to secure the loan; second, that appellee has forfeited its rights as a building and loan association by issuing paid-up stock to obtain its loaning funds, and therefore the note and mortgage are usurious; third, that by reserving eight per cent interest on moneys advanced for taxes, assessments and insurance by appellee, the whole contract was tainted with usury.

As to the first proposition, the records of the association show that on January 9, 1893, six sales of money were made, one at a premium of nineteen per cent and the others at eighteen. On February 20, 1893, the defendant, Lou C. Lurton, applied for a loan and a committee was appointed to investigate the application and examine the security. A week later there was a meeting, at which there was an informal discussion of the application, but nothing was decided. On March 6, 1893, the following written application was made:

"\$4510.00.

JACKSONVILLE, ILL., *March 6, 1893.*

"I hereby apply for a loan of forty-five hundred and ten dollars net, on fifty-five shares of stock of the Jacksonville Loan and Building Association, at eighteen per cent premium, on my property situated on the west side of Webster avenue, in Jacksonville, Ill., valued at.....dollars, yearly rental.....dollars.

LOU C. LURTON,  
By W. S. LURTON."

At that meeting the minutes relating to said application are as follows: "Called meeting of the board to confer with the committee on the Lou C. Lurton application. Present: A. L. Hay, D. T. Heimlich, E. M. Kinman, W. D. Mathers, S. A. Fairbank, J. S. Magill and J. M. Mitchell. On motion of J. M. Mitchell, seconded by S. A. Fairbank, the board agreed that the association would loan Lou C.

Lurton \$4500 on her property on Webster avenue, on the house now in course of erection on said premises, completed according to plans and specifications shown the board, and turned over without any encumbrance and all materials paid for and contract satisfied. On motion of W. D. Mathers, seconded by J. M. Mitchell, the board agreed that the association should furnish Lou C. Lurton her loan, when the above conditions were complied with, at the last bid, at the last sale of money, which was eighteen per cent." The application for the money was at a premium of eighteen per cent, and the money was loaned at that premium, which was the highest bid at the last sale of money.

It is contended that because there was no competitive bidding the note and mortgage are void, but under the circumstances of this case it is immaterial whether the business was done in the manner prescribed by the statute or not. The powers of a corporation are limited and delegated, and where a contract is *ultra vires* in the proper sense, as not being within the powers conferred upon the corporation by the legislature or within the object of its creation, the contract is void. (*National Home Building Ass. v. Home Savings Bank*, 181 Ill. 35; *Rogers v. Jewell Belting Co.* 184 id. 574; *Best Brewing Co. v. Klassen*, 185 id. 37.) But where the contract is one which the corporation has power to make and is within the scope of its franchise, neither party to the contract who has had the benefit of it can set up as a defense that legal formalities were not complied with or that the power was improperly exercised. The complainant was created for the purpose of loaning money to its members, and the loan to Lou C. Lurton was in line with such powers and within the scope of the franchise. She acted in good faith in bidding for the money and the board in good faith in accepting her bid. Both understood that the bid, contract and loan were valid and binding. The contract was performed in good faith by the complainant, and she had the

benefit of it, and up to the time of her default recognized the contract as valid. She is estopped to dispute the validity of the note and mortgage. *Kadish v. Garden City Equitable Loan and Building Ass.* 151 Ill. 531.

The evidence does not sustain the second charge, that the association has lost its character as a loan and building association. The certificates issued were in all cases alike and there was nothing in the nature of paid-up stock. All the members stood upon the same footing, although a very few made payments on dues in advance and not at the same periods fixed by the rules. There was nothing in the nature of an investment of capital for the purpose of loaning it under the guise of a building and loan association.

The mortgage provided that in case of default on the part of the mortgagor in the payment of taxes, assessments and insurance the mortgagee might pay the same, and the money so paid should become an additional indebtedness and draw interest at the rate of eight per cent from the date of payment. There were such payments made by the complainant as mortgagee, and it is argued that this agreement made the whole contract usurious. The court allowed only the principal of moneys advanced under that agreement and refused to allow any interest thereon. An old blank form of mortgage was used and by a mere oversight was not changed to correspond with the change in the statute. The rate of interest reserved on the principal indebtedness was lawful, and the agreement for eight per cent related only to any advances that might be made for taxes, assessments and insurance. There was no intention to make moneys so advanced draw interest at eight per cent, and we think the court was right in applying the agreement only to such advances.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*



LOUIS HUTT

v.

THE CITY OF CHICAGO *et al.**Opinion filed October 19, 1900.*

CONDEMNATION—*a certain description is sufficient.* If the description of property in condemnation petition, when all read together, is without ambiguity or uncertainty as to the land described, it is sufficient, whether the designation of one corner of the land as the "north-easterly corner" is scientifically correct or not.

APPEAL from the Circuit Court of Cook county; the Hon. E. F. DUNNE, Judge, presiding.

EDWIN L. HARPAM, and CHARLES C. GILBERT, for appellant.

CHARLES M. WALKER, Corporation Counsel, and DENIS E. SULLIVAN, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

This suit arose from an attempt of the city of Chicago to take possession of part of a lot in that city which it claimed had been condemned for an extension of Canal street, from Lumber street south across the Chicago river to Twenty-second street. Louis Hutt, the appellant, filed his bill to enjoin the city and its officers from taking such possession, and the city answered claiming the property as part of said street by virtue of the condemnation proceedings. The city then filed its cross-bill, setting out said proceedings and alleging that the compensation for the property was ascertained and was received by Hutt, and that the same piece of ground described in his original bill was the property condemned under a somewhat different description, and prayed that the judgment in the condemnation suit should be amended and corrected

so that the description of the tract should read the same as in said original bill. Hutt demurred to the cross-bill but the demurrer was overruled, and he answered denying that he was served with process in the condemnation suit or that he received the judgment, and alleged that the money received by him was in payment of a different judgment. There was a hearing on the bill and cross-bill and the answers thereto. The court dissolved an injunction which had been granted and dismissed the original bill, and granted to the city the relief prayed for in its cross-bill.

The record showed that Hutt was served with process in the condemnation suit. He afterward petitioned the court, alleging that he was the owner of the piece of ground condemned, and asked for a rule requiring the city to pay him the compensation awarded or have the proceeding dismissed. On that motion the court ordered the city to pay the clerk of the court the amount of the judgment for his use. The judgment was paid and he received the money.

Canal street runs practically north and south, and the city passed an ordinance extending said street southward, and annexed to the ordinance a map or plan which showed that the street as extended included a triangular piece of lot 2 in block 34 in a canal trustees' subdivision, then owned by Hutt. A petition was filed to ascertain the compensation to be paid for property taken by said extension, in which said triangular piece was described as follows: "All that part of lot 2, in block 34, lying east of a straight line drawn from a point on the westerly line of Todd street 104.73 feet south-easterly of the north-easterly corner of lot 1, in said block 34, to a point in the westerly line of Grove street 46.7 feet south-westerly of the north-easterly corner of lot 2, in said block 34." It was for this property that the compensation was ascertained and paid to Hutt. He described the premises in his bill as follows: "All that part of lot two (2), in block

thirty-four (34), aforesaid, lying east of a straight line drawn from the westerly line of said Todd street, in said city of Chicago, one hundred and four and seventy-three hundredths (104.73) feet south-easterly of the most northerly point or corner of lot one (1), in said block thirty-four (34), aforesaid, to a point in the westerly line of Grove street forty-six and seven-tenths (46.7) feet south-westerly of the most easterly point or corner of said lot two (2), in said block thirty-four (34), aforesaid." His claim is that the corner which he called the most northerly point or corner of lot 1 is not the north-easterly corner, and that therefore his property was not described in the condemnation proceeding and the city acquired no right to the possession of it.

Lots 1 and 2 in block 34 lie between Grove street on the south-east, Todd street on the north-east and the Chicago river on the north-west. Grove street runs north-easterly, and Todd street runs from an intersection of Grove street in a north-westerly direction to the Chicago river. Taking into account the whole description in the petition for condemnation, it is clear that the corner which Hutt describes as the most northerly point or corner of lot 1 is the one intended by the description of "the north-easterly corner," in the petition. There is no other corner of the lot which will answer to the description of the north-easterly corner. The corner in question is at the intersection of Todd street and the Chicago river. The line mentioned in the description is drawn from a point on the westerly line of Todd street south-easterly of a corner of lot 1. Todd street runs south-easterly from the river and from the corner in question to Grove street. To adopt any other corner of lot 1 than the corner at the intersection of Todd street and the river as the one intended would be absurd, because the starting point would not then be on Todd street at all, but would be east of Grove street on other lands. Again, the premises are described as a part of lot 2, and if an-

other corner should be taken as the north-easterly corner of lot 1 no part of lot 2 would be east of the line. The point in the westerly line of Grove street where the line terminates is correctly located, and in order to include any land in lot 2 east of the line it must necessarily run to the corner at the intersection of Todd street and the river. The condemnation was for the extension of Canal street, and the description as contended for by Hutt would neither be an extension of Canal street nor describe any property whatever. The description as contended for by Hutt is without sense or meaning and does not include any property. Hutt produced two civil engineers who testified that the corner in question was the most northerly corner but was not correctly termed the north-easterly corner. The testimony in his behalf was, that the line of Todd street next to lot 1 runs forty-six degrees forty minutes west of north, and is therefore one degree forty minutes westerly and southerly of a true north-west line. Therefore, the corner in question was not the north-easterly corner. If this corner is not the north-easterly corner there is none, and it is not denied that if this corner was taken to be the north-easterly corner the description was intelligible and a proper description of the premises, and that the description as given or as interpreted by any of the witnesses would not fit any other land than the tract in question. Whether the designation of the corner in question as the north-easterly corner was scientifically correct or not, there is no doubt whatever that it was the corner intended. The description must be all read together, and when so read there is no ambiguity or uncertainty about the land described, and the description was of the same premises which complainant sought to enjoin the city from taking and which had been condemned and paid for.

It is argued that the court had no power to reform the judgment under the prayer of the cross-bill, but as we hold that the original description was correct and

describes the same land as the amended description, it becomes immaterial whether the court had power to reform it. There is, in fact, no change, and the description was the same before as after.

The decree is affirmed.

*Decree affirmed.*

## THE BIRDSSELL MANUFACTURING COMPANY

v.

WILLIAM H. OGLEVEE *et al.*

*Opinion filed October 19, 1900.*

1. APPEALS AND ERRORS—*weight of evidence is not a question for the Supreme Court in suits at law.* If there is any evidence in the record tending to support the judgment of the Appellate Court in a suit at law, such judgment, so far as the facts are concerned, is not reviewable by the Supreme Court, whether the evidence in support thereof is weak or strong.

2. ACTIONS AND DEFENSES—*one electing to treat agent's unauthorized transfer of property as a sale waives action in tort.* If a manufacturing company, which employs a corporation as agent to sell its machinery, elects to treat an unauthorized disposition of certain machinery by the corporation as a sale and to accept the corporation as its contract debtor for the amount, such company cannot thereafter sue either the corporation or its individual members in tort for a conversion of the property.

*Birdsell Manf. Co. v. Oglevee*, 87 Ill. App. 351, affirmed.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of DeWitt county; the Hon. W. G. COCHRAN, Judge, presiding.

On January 11, 1895, appellant, an Indiana corporation, made a consignment of wagons and other property to the Leavitt & Oglevee Company, an Illinois corporation, the consignee agreeing to sell the same and to remit the proceeds thereof, when sold, to appellant. A part were sold and remitted for. On December 18, 1895, the

187	149
f198	1458
187	149
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Leavitt & Oglevee Company traded the balance of the property consigned to it by the appellant, invoiced at \$1475.15, with other property, to one Evans for the equity in a tract of land located in the State of Missouri. On January 26, 1896, and again on December 7, 1896, the appellant was advised of this trade, and all the details thereof, and made no objections thereto.

In July and August, 1895, the Leavitt & Oglevee Company was garnisheed, as a debtor of appellant, at the suit of the Illinois Malleable Iron Company and the Independent Fire Sprinkler Company, for the respective sums of \$635.19 and \$414.50, and for which sums, on December 8, 1896, by the consent of appellant, judgments were rendered against the Leavitt & Oglevee Company. These judgments were afterward set aside on the ground that no judgments had been rendered against the appellant prior to the rendition thereof. Later, however, judgments were rendered against appellant, and the judgments against the garnishee were renewed.

On November 26, 1897, this suit was brought in assumpsit against the appellees, as individuals, for the purpose of recovering the balance due appellant from the Leavitt & Oglevee Company, that company having become insolvent, and the appellees having been the officers and managers thereof at the time the trade was made with Evans. Later the form of action was changed to trover. A jury having been waived, a trial by the court resulted in a finding and judgment in favor of appellees, which judgment has been affirmed by the Appellate Court for the Third District, and the present appeal is prosecuted from such judgment of affirmance.

SHOPE, MATHIS & BARRETT, J. B. HUTCHINSON, and MOORE, WARNER & LEMON, for appellant.

GEORGE K. INGHAM, B. F. SHIPLEY, and MILLS BROS., for appellees.

Mr. JUSTICE HAND delivered the opinion of the court:

The appellant insists there is no evidence to support the judgment in this case, and for that reason, mainly, asks for a reversal thereof. We have looked into the record carefully, and are of the opinion it contains some evidence tending to show that after appellant was notified of the transfer to Evans it acquiesced therein, treated its consignment as a sale to the Leavitt & Oglevee Company, and thereby waived the alleged tort and elected to accept such company as its contract debtor. Whether this evidence is weak or strong is not a question for this court, as the judgment of the Appellate Court in respect to the facts, where there is any evidence tending to support the judgment, is final, and cannot be reviewed by this court. *Chicago and Alton Railroad Co. v. Kelly*, 127 Ill. 637; *Hamburg-American Packet Co. v. Gattman*, 127 id. 598; *Cothran v. Ellis*, 125 id. 496; *McCormick Machine Co. v. Burandt*, 136 id. 170; *Hawk v. Chicago, Burlington and Northern Railroad Co.* 138 id. 37; *National Syrup Co. v. Carlson*, 155 id. 210.

The appellant contends the Leavitt & Oglevee Company and the appellees are joint tort-feasors, and that the evidence of waiver as to the company is immaterial; that it may elect to waive the tort as to the Leavitt & Oglevee Company, and afterwards sue the appellees in an action *ex delicto* for the conversion of its property wrongfully turned over to Evans. A corporation can act only through its officers or agents. If the Leavitt & Oglevee Company wrongfully converted the property of appellant at the time of the transfer to Evans and thereby made itself liable to an action in tort, such tort could be waived only by the acts and dealings of appellant with the officers of the Leavitt & Oglevee Company. In this case the appellees were acting as officers of the Leavitt & Oglevee Company in making the transfer to Evans. When the appellant elected to treat the transfer by the Leavitt & Oglevee Company to Evans as authorized and accepted the Leavitt & Oglevee Company as its

debtor, it waived its right of action in tort against the appellees as officers and managers of the company, as well as against the company.

"A man may not take contradictory positions, and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one with knowledge, or the means of knowledge, of such facts as would authorize a resort to each, will preclude him thereafter from going back and selecting again." (28 Am. & Eng. Ency. of Law, p. 570.) It was held in *Buckland v. Johnson*, 15 C. B. 145: "Where the plaintiff has sued one of two joint tort-feasors in tort and recovered judgment, he can not afterward sue the other for money had and received;" and in *Terry v. Munger*, 121 N. Y. 161, that the bringing of an *ex contractu* action by the owner against some of the wrongdoers for the conversion of personal property is a final election to treat the transaction as a sale, and that the owner of the property cannot subsequently sue another wrongdoer for a conversion thereof. The court say: "It is urged that this election of the plaintiffs is not binding upon them in favor of the defendant herein, because it was only against the defendants in the other action that they made their election. It is said there is no case to be found where an election has been treated as binding in favor of a stranger to the transaction, and that the defendant herein is such stranger so far as the plaintiff's transaction with the defendants in the other action is concerned. I do not think this claim can be maintained. In the first place, what is the nature of the plaintiffs' act in electing to consider the transaction as a sale? It is a decision or determination upon their part to, in effect, ratify and proclaim the lawfulness of the act of taking the property, and it is an assertion on the plaintiffs' part that in so doing the plaintiffs' interest in the property was purchased, and that thereby their whole



title was transferred and they ceased to own any part of the property, and that those who took it impliedly promised the plaintiffs to pay them the value of their interest in such property. This being so, why does not such transfer of title bind the plaintiffs as to the whole world? Surely, the title which plaintiffs once had in the property cannot at the same time rest with them and pass to those who took it. If the title really once passed, that would be a fact actually existing, which anybody ought to have the right to prove if it became material in protecting his own rights."

If, with full knowledge of all the facts, the appellant deliberately elected to treat the transaction, in which appellees' share was well known, as a sale of the property, it cannot afterwards recover from the appellees damages for the conversion by them of the very same property which it has already said it sold, by virtue of the very transaction which it now claims amounted to a conversion of the property by appellees. The appellant, by its own free choice, elected to sell the property to the Leavitt & Oglevee Company, and having done so, it necessarily follows it has no cause of action against the appellees for an alleged conversion of the same property by the same acts which it had already treated as amounting to a sale. The evidence tending to show the appellant, after being notified of the transfer to Evans, acquiesced in such transfer and treated its consignment as a sale to the Leavitt & Oglevee Company, and thereby waived the alleged tort and accepted such company as its contract debtor, was competent and material and proper to be considered by the court in determining the liability of appellees.

We find no substantial error in this record. The judgment of the Appellate Court is therefore affirmed.

*Judgment affirmed.*

BENJAMIN R. DORMAN *et al.*

v.

M. L. DORMAN *et al.**Opinion filed October 19, 1900.*187 154  
f191 1407187 154  
198 73187 154  
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208 188  
e208 487  
206 608187 154  
212 968  
e212 864  
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214 812  
114a 529

1. TRUSTS—*resulting trust arises by implication of law.* As between strangers, the law implies a resulting trust where one pays the purchase money but the conveyance of title is to another; but if the payment is by a husband and the title is conveyed to the wife the law presumes that the transaction was intended as an advancement, which presumption, however, may be rebutted by parol evidence, if clear and satisfactory.

2. SAME—*what evidence sufficient to overcome presumption of gift.* Evidence that the husband paid the purchase money, took possession, made improvements, paid the taxes and occupied the property as a home, at all times controlling and managing it as his own, is sufficient, when coupled with the wife's admission that she held the legal title in trust for her husband and the fact that the property constituted the bulk of his estate, to overcome the presumption that the conveyance to the wife was intended as a gift.

3. LACHES—*laches will not be imputed to one in possession.* A husband who enters upon land purchased by him and who remains in the undisturbed possession thereof, both before and after the death of his wife, who held the legal title, is not chargeable with *laches* in asserting a resulting trust, since his possession is notice to the world of all his rights.

4. PLEADING—*defendant in chancery must set up defenses by answer.* A defendant in chancery cannot avail himself of defenses appearing from the evidence but not set up in his answer, and hence unless the answer to a bill by a husband seeking a conveyance to him of a legal title standing in his wife's name contains an allegation that the title was put in the wife's name to hinder or delay creditors of the husband, that question will not be considered.

APPEAL from the Circuit Court of Christian county;  
the Hon. WILLIAM M. FARMER, Judge, presiding.

This is a bill in equity filed by Benjamin R. Dorman and Alonzo H. Ranes, against Martin L. Dorman, Eva Dorman, Galen Dorman, R. I. Smith and C. B. Klinefelter, for the partition of an eighty-acre tract of land located in Christian county. The bill, as finally amended and as

it stood at the time of the trial, alleged that Mary A. Dorman was the owner of the premises in question; that she died in the year 1878, leaving her surviving Martin L. Dorman, her husband, and Benjamin R. Dorman, Galen Dorman and Eva Dorman, as her children and only heirs-at-law; that on August 28, 1897, Benjamin R. Dorman conveyed an undivided two-fifths of his interest in the premises to Alonzo H. Ranès; that R. I. Smith had a judgment for \$99.80 and costs against Benjamin R. Dorman, and that C. B. Klinefelter was a tenant living on the land, and prayed for an assignment of dower and the partition of the land.

Martin L. Dorman, Eva Dorman and Galen Dorman filed joint and several answers, denying that Mary A. Dorman in her lifetime was the owner of the premises, and averring that during her lifetime and at the time of her death she held the legal title thereto in trust for the use and benefit of Martin L. Dorman, as the equitable owner thereof.

Martin L. Dorman filed a cross-bill, averring that in December, 1873, he purchased the premises from one A. J. Willey and received a contract for a deed; that in February, 1875, he had fully completed the payment of the purchase money therefor and was entitled to a deed; that at that time he made a verbal contract with Mary A. Dorman, his wife, that the land should be deeded by Willey to her, the same to be held by her in trust for his use and to be conveyed to him by her upon request; that pursuant to such contract, and in accordance with the terms thereof, Willey conveyed the premises to her; that she did not record the deed therefor, did not claim to own the land and did not exercise any authority over the same; that he paid the consideration for the purchase of the land; that upon its purchase he took immediate possession thereof; that he had made lasting and valuable improvements thereon, and had been in the possession thereof, received the rents and profits therefrom, paid the

taxes thereon and been recognized as the owner thereof from the time of the purchase until the bringing of this suit; that Mary A. Dorman died on July 18, 1878, without having conveyed the premises to him; that he was the equitable owner thereof, and that Mary A. Dorman had no interest therein but held the same in trust for him. Benjamin R. Dorman, Alonzo H. Raney and R. I. Smith answered the cross-bill, setting up the Statute of Frauds, the Statute of Limitations and *laches*.

The court dismissed the original bill, sustained the cross-bill and decreed Martin L. Dorman to be the equitable owner of the premises; that he be invested with the legal title thereto, and that the deed from Benjamin R. Dorman to Alonzo H. Raney be canceled as a cloud upon his title. To reverse this decree the complainants have prosecuted this appeal.

JOHN E. HOGAN, for appellants:

Parol evidence should not be received to change a written contract or deed. *Gardt v. Brown*, 113 Ill. 475.

A purchaser, or one holding under him, for a valuable consideration, without notice of defect in title, acquires a good and valid title. *Robbins v. Moore*, 129 Ill. 30.

A person, for an unreasonable delay in asserting title, is estopped by reason of *laches* from asserting a resulting trust against real estate. *Collier v. Beers*, 106 Ill. 150.

All express trusts created by parol are void. *Loomis v. Loomis*, 28 Ill. 454; *Alexander v. Tams*, 13 id. 221; *Green v. Cook*, 29 id. 193.

A parol agreement between grantor and grantee, whereby the latter is to hold the land in trust for the grantor or re-convey to him upon a certain contingency, cannot be enforced as against a plea of the Statute of Frauds. *Williams v. Williams*, 180 Ill. 361.

A resulting trust arises, if at all, at the time the deed is taken and upon the facts then existing. *Reed v. Reed*, 135 Ill. 487; *Koster v. Miller*, 149 id. 200.

Equity will not entertain a bill to enforce a resulting trust where land is purchased with complainant's money and taken in the name of the defendant to defraud creditors. *Redmond v. Pakenham*, 66 Ill. 434.

The purchase of land in the name of the wife will *prima facie* be presumed as an advancement or settlement, and not a trust. *Goelz v. Goelz*, 157 Ill. 45.

CHARLES H. SHAMEL, and JOHN B. COLEGROVE, for appellees:

Possession is notice to the world of the rights of the holder, and *laches* by delay in asserting a legal right will not be imputed to one who has possession of the premises in question. Therefore the action is not barred by the Statute of Limitations or by supposed *laches*. *McNamara v. Garrity*, 106 Ill. 384; *King v. Hamilton*, 16 id. 195; *Reeves v. Ayres*, 38 id. 418; *McManus v. Keith*, 49 id. 388.

Possession is notice of a trust. Perry on Trusts, secs. 223-229; *Thomas v. Burnett*, 128 Ill. 43; *Parker v. Shannon*, 137 id. 393; *Springfield v. Roll*, 137 id. 215.

An express trust, not in writing, is good except where the Statute of Frauds is specially pleaded. But an oral express trust will be taken out of the operation of the Statute of Frauds by (1) furnishing the consideration, (2) the making of valuable and permanent improvements, and (3) possession and payment of taxes. *McNamara v. Garrity*, 106 Ill. 384; *Kurtz v. Hibner*, 55 id. 514; *Pickrell v. Morss*, 97 id. 220; *Hawkins v. Hunt*, 14 id. 42; *Keys v. Test*, 33 id. 316; *Bright v. Bright*, 41 id. 97; *Blunt v. Tamlin*, 27 id. 93; *Tyler v. Eckhart*, 1 Bin. 378; *Mason v. Blair*, 33 Ill. 194.

Where land is paid for with the money of one person and the title taken in the name of another, such other person holds the land in trust for the one who furnished the consideration. *Mayfield v. Forsyth*, 164 Ill. 32; *Emmons v. Moore*, 85 id. 304; *VanBuskirk v. VanBuskirk*, 148 id. 9.

There is a well recognized exception to the rule where the conveyance is made to a wife or child. In such a

case, in the absence of evidence on that point, the law presumes it to have been the intention of the parties that it is an advancement. But such presumption may be rebutted by evidence that the intention of the parties was otherwise. It depends wholly on the intention of the grantor. It is to this intention that the presumption relates, and if the evidence shows that it was not the intention of the parties that property conveyed to a wife or child should be an advancement or gift, then the presumption is wholly overcome and the general rule prevails, which, under the facts in this case, makes it a trust. *Smith v. Smith*, 144 Ill. 299; *Maxwell v. Maxwell*, 109 id. 588; *Taylor v. Taylor*, 4 Gilm. 303; *Pool v. Phillips*, 167 Ill. 432; *Reed v. Reed*, 135 id. 482.

A parol agreement to create an express trust will not aid or prevent a resulting trust if the facts are such as produce the implication of law from which a resulting trust arises. *Furber v. Page*, 143 Ill. 622; *Smith v. Smith*, 85 id. 189; *Williams v. Brown*, 14 id. 202; *Wallace v. Carpenter*, 85 id. 590; *McNamara v. Garrity*, 106 id. 384.

Mr. JUSTICE HAND delivered the opinion of the court:

The evidence in this case clearly establishes that Martin L. Dorman purchased the land in the year 1873 from A. J. Willey; that he paid the consideration therefor, but at the time the deed was made the title thereto, at his request, was conveyed to Mary A. Dorman, his wife. A resulting trust arises, by implication of law, from the acts of the parties. (1 Perry on Trusts, sec. 134; *Donlin v. Bradley*, 119 Ill. 412; *VanBuskirk v. VanBuskirk*, 148 id. 9.) When the evidence shows the payment of the purchase money by one and the conveyance of the title thereby purchased to another, between parties who are strangers to each other, the law so construes these two facts as to make them constitute a resulting trust. (*Smith v. Smith*, 85 Ill. 189; *VanBuskirk v. VanBuskirk*, *supra*.) If the legal title is taken in the name of the wife such im-

plication does not arise, it being the presumption that the same was intended as an advancement. (*Smith v. Smith*, 144 Ill. 299.) Such presumption may, however, be rebutted by parol testimony, if the same is clear and satisfactory. Thus, it is said in *Perry on Trusts* (sec. 147): "Whether a purchase in the name of a wife or child is an advancement or not is a question of pure intention, though presumed, in the first instance, to be a provision and settlement; therefore any antecedent or contemporaneous acts or facts may be received either to rebut or support the presumption, and any acts or facts so immediately after the purchase as to be fairly considered a part of the transaction may be received for the same purpose." The rule thus announced has been fully recognized by this court in numerous cases. *Taylor v. Taylor*, 4 Gilm. 303; *Adlard v. Adlard*, 65 Ill. 212; *Wormley v. Wormley*, 98 id. 544; *Johnston v. Johnston*, 138 id. 385; *Smith v. Smith*, 144 id. 299; *Goelz v. Goelz*, 157 id. 33; *VanBuskirk v. VanBuskirk*, 148 id. 9; *Pool v. Phillips*, 167 id. 432.

The controlling question in this case is, did Martin L. Dorman, at the time he caused the title to this land to be placed in his wife, intend to make an absolute gift of the property to her, or was it his purpose that she should simply hold the title for him? The presumption is he intended the same as an absolute gift. The burden of proof is upon him to overcome such presumption.

We have examined the record in this case with much care and are fully convinced that Martin L. Dorman never intended to give this property to his wife, but that he took the title in her name with the understanding and expectation that she would re-convey the same to him on request. It clearly appears from competent and credible evidence that Martin L. Dorman took possession of the property almost immediately after the purchase; that he made permanent and lasting improvements, paid the taxes and after a time occupied it with his family as a home; that he at all times controlled and managed it as

his own, and that his wife recognized his right so to do, and at least on one occasion stated that the land was deeded to her in trust and that she intended to deed it back to her husband; that this property constituted the principal part of his entire estate, and that he had a family of small children dependent upon him for support. The facts that the husband may have taken possession of the land, improved it, paid the taxes thereon and occupied it with his wife as a homestead would not be sufficient, alone, to overcome the presumption of a gift, for the reason there is nothing in these facts inconsistent with the theory of an advancement; still, we think these facts, taken in connection with the admission of the wife that she held this property in trust for the benefit of her husband, and the further fact that this property, at the time of the conveyance, constituted the bulk of his estate, sufficient to rebut the presumption of an advancement.

Martin L. Dorman had been in possession of the property from the time of the purchase thereof, and his right to use and possess the same seems never to have been called in question until a short time before the filing of the original bill. His possession was notice to the world of all his rights, and *laches* cannot be imputed to him. *Wormley v. Wormley*, 98 Ill. 544; *McNamara v. Garrity*, 106 id. 384.

It is contended by appellants that a court of equity is powerless to grant relief in cases of this character. This court has heretofore, in a number of cases where the facts are substantially as here established, granted relief similar to that prayed for in the cross-bill herein. *Adlard v. Adlard*, 65 Ill. 212; *Wormley v. Wormley*, 98 id. 544; *Stone v. Wood*, 85 id. 603; *Pool v. Phillips*, 167 id. 432.

It is further contended by counsel for appellants that Martin L. Dorman caused the property to be conveyed to his wife to hinder or defraud or delay his creditors. It is undoubtedly the law that where a conveyance has been made for such purpose equity will not interpose to



restore to the grantor or his heirs the title to the property so fraudulently conveyed. (*Dunaway v. Robertson*, 95 Ill. 419; *Francis v. Wilkinson*, 147 id. 370; *McElroy v. Hiner*, 133 id. 156.) But no such issue is made by the pleadings in this case, and that question is not before us. Martin L. Dorman charged in his cross-bill that the property was purchased with his money, and that Mary A. Dorman, at the time of her death, held the same in trust for his benefit. There is no allegation in the answer to the cross-bill that the title to this property was conveyed to Mary A. Dorman for the purpose of hindering or delaying or defrauding the creditors of Martin L. Dorman. This court held in *Crone v. Crone*, 180 Ill. 599, which was a bill to enforce a resulting trust, that a defendant in chancery is bound to apprise the complainant of the nature of his defense, and cannot avail himself of matters of defense appearing from the evidence but not set up in the answer, and refused to consider the question whether or not the property had been conveyed to defraud creditors as the answer contained no such allegation, although the evidence tended to show that fact.

We do not deem the question of the competency of Martin L. Dorman as a witness in his own behalf of any importance. The court seems to have limited his testimony to transactions which took place after the death of his wife. As the trial was before the court and there is ample evidence in the record to sustain the decree without the consideration of his testimony, we will presume the trial court considered only such testimony as was competent and disregarded such as was incompetent.

The decree of the circuit court will be affirmed.

*Decree affirmed.*

HENRY B. KEPLEY

v.

JULIA FOUKE.

*Opinion filed October 19, 1900.*

1. TAX DEEDS—*tax deed alone is not evidence of title.* One desiring to avail himself of the effect of a tax deed as evidence of title, and not color of title, merely, should introduce in evidence the notice on which such deed was founded.

2. SAME—*clerk's certificate should be made on day advertised for sale.* Under section 194 of the Revenue act, as amended in 1879, the county clerk's certificate to the delinquent tax list should be made on the day advertised for sale, and if made on the day that the judgment was rendered the sale is void for want of proper process.

WRIT OF ERROR to the Circuit Court of Effingham county; the Hon. TRUMAN E. AMES, Judge, presiding.

HENRY B. KEPLEY, for plaintiff in error.

G. T. TURNER, for defendant in error.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

Defendant in error brought suit in ejectment to recover the south-east quarter of the north-west quarter of section 15, township 7, north, range 5, east of the third principal meridian, in Effingham county, Illinois, and recovered judgment, to reverse which this writ of error is prosecuted.

It was stipulated on the hearing that title to the premises was in plaintiff, and the effect of a certain tax deed issued to the defendant June 23, 1897, together with the record of sale for taxes and proceedings thereunder, and under which defendant claims title, is the sole question for determination in this court.

The tax deed was introduced in evidence, but plaintiff in error did not introduce the notice on which said deed was based. The deed alone was not sufficient on which

to base title. It is only color of title in itself, together with *prima facie* proof of certain facts enumerated by statute. The tax deed is a creature of statute, and must be given that meaning and intendment only which the statute directs. The deed is made *prima facie* evidence of the facts enumerated in the statute, and this court cannot extend it further. Had plaintiff in error desired to avail himself of the effect of the deed as an evidence of title, and not color of title, merely, he should have introduced the notice on which it was founded. In *Gilbreath v. Dilday*, 152 Ill. 207, it is said (p. 212): "Appellant's claim of title is under a tax deed. The record shows a sale of this land for taxes and the assignment of the certificate to the appellant. No judgment or precept appears in the evidence, nor is there evidence of the publication of notice, further than the recital in the affidavit of appellant that 'this deponent caused a proper notice to be published,' etc. Whilst a tax deed is, under the statute, (chap. 120, sec. 224,) *prima facie* evidence of certain facts, the sufficiency of the form and manner of publication and the proof of publication are not of those facts."

The tax deed was insufficient for another reason. The record introduced in evidence shows that judgment was entered for delinquent taxes against the land in question on May 6, 1895. The sale thereon was had June 1, 1895. The certificate of the county clerk required to be made by section 194 of chapter 120 of our statutes was made May 6,—the day judgment was rendered,—whereas that section requires the certificate to be made on the day advertised for sale, on which day it is made the duty of the clerk to "carefully examine said list upon which judgment has been rendered, and see that all payments have been properly noted thereon," and then requires him to thereupon make a certificate of record, prescribing the form thereof. We have held that if this certificate is not made the sale is void for want of process. See

*Glos v. Randolph*, 138 Ill. 268, *Ames v. Sankey*, 128 id. 523, *Ogden v. Bemis*, 125 id. 105, and *Eagan v. Connelly*, 107 id. 458, and cases there cited, where this court held that no subsequent amendment could relate back so as to cure that defect in the record to validate any sale made without this certificate or precept. A certificate made on the sixth day of May might or might not recite facts existing on the first day of June following, but we cannot indulge any presumption that it did.

From the above it appears that the plaintiff in error took nothing under his tax deed, and it is unnecessary to discuss other reasons assigned for holding his deed inoperative.

The judgment of the circuit court of Effingham county is affirmed.

*Judgment affirmed.*

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R. T. HICKS

v.

WILLIAM DEEMER.

*Opinion filed October 19, 1900.*

1. TRIAL—*when objection to introduction of a will in evidence is sufficiently specific.* An objection to the introduction of a will in evidence on the ground that no sufficient foundation had been laid for the same is sufficiently specific to direct the court's attention to the absence of proof of probate.

2. EVIDENCE—*when admission of will in evidence is error.* The admission in evidence, over proper objection, of a paper purporting to be an original will filed and recorded in the office of the county clerk, where no proper proof of probate is made, is error.

3. SAME—*when proof of the ownership of land is essential to recovery.* Under a declaration averring the plaintiff's ownership of land in fee simple absolute, and alleging that he was deprived of that estate by the fraud and deceit of the defendants, the plaintiff's right of action depends upon proof of his ownership as alleged.

4. DAMAGES—*measure of damages for fraud in inducing plaintiff to part with his interest in land.* In an action for fraud in inducing the

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plaintiff to part with his interest in land under the mistaken belief, brought about by the defendant's representations, that he owned only a life estate, the measure of damages is the difference between the value of the actual title conveyed and the *value* of the title which defendant represented to exist and which the plaintiff believed he conveyed.

*Hicks v. Deemer*, 87 Ill. App. 384, reversed.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Pike county; the Hon. T. N. MEHAN, Judge, presiding.

MATTHEWS & GRIGSBY, for appellant.

WILLIAM MUMFORD, and HUGH JOHNSTON, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

This is an action on the case brought by appellee, William L. Deemer, against Ransom Kessinger, William F. Hess and appellant, R. T. Hicks, for damages on account of alleged fraud and deceit in misrepresenting to the appellee the title which he had in certain lands, and thereby causing him to convey and cause to be conveyed said lands to appellant, R. T. Hicks, for a sum much less than they were actually worth. The declaration contains three counts, in each of which it is averred that the plaintiff is a person of weak understanding, unlearned, unlettered and unable to read or write; that his father, Jacob Deemer, being the owner in fee simple of the said lands, devised them unto the plaintiff in fee simple, and that the defendants, knowing the contents of the will and the estate thereby devised, fraudulently represented to plaintiff that he had only a life estate in said lands. The first count alleged that the legal title to the lands was in the plaintiff. The second alleged the title to be in him subject to an encumbrance to his brother, Wesley

Deemer, and the third alleged that Wesley Deemer held the legal title in trust for the plaintiff. The first and third charged that, by means of the false and fraudulent misrepresentations of the defendants, the plaintiff was induced to convey and cause to be conveyed the lands to defendant R. T. Hicks. The second charged that plaintiff, with his brother, Wesley Deemer, directed a deed of the life estate, only, to the defendant R. T. Hicks to be prepared, but the defendant Hess prepared an instrument, under the direction of the other defendants, conveying the whole title. The case was tried upon a plea of the general issue, and at the close of the evidence the suit was dismissed as to the defendant Ransom Kessinger. There was a verdict against the defendants R. T. Hicks and William F. Hess for \$1200, followed by a judgment for that amount, which the Appellate Court affirmed.

The wrong charged against the defendants at the trial was in causing plaintiff to believe that he owned only a life estate in one hundred and twenty acres of land in Pike county, whereas, in truth, he owned the same in fee simple, and in causing him to part with his interest in the land under the mistaken belief, induced by the defendants, that he owned a life estate, only. On the question whether the alleged representations were made by defendants the evidence was conflicting. After the death of plaintiff's father there were judgments against plaintiff and Truman Fisher, with whom plaintiff had been in partnership in business, aggregating about \$1900. Plaintiff, hearing that the judgment creditors would endeavor to make the money out of this land, made a deed, together with his wife, to his brother, Wesley. This deed was made with an agreement, as he testified, that his brother should pay off the judgments, and on being re-paid should re-convey the land to plaintiff's wife. The judgments were not paid and bills were filed by the creditors to set aside the deed and subject the lands to executions on the judgments. Plaintiff testified that he was unlearned and

unlettered, and consulted the defendant Hess, a lawyer, as to what he had better do, and through Hess a sale was made to the defendant Hicks. A conveyance was made from Wesley Deemer to Hicks in consideration that Hicks would pay off the judgments and the sums named in the will to be paid by plaintiff, and pay \$1000 to plaintiff. Hicks afterward conveyed the land to a third party.

It was proved that the legal title to the lands was vested in plaintiff's brother, Wesley Deemer, and that plaintiff's title was equitable, only, and on these grounds it is contended that there was no right of action, at law, in the plaintiff, but that, his right or estate being purely equitable, the jurisdiction is in equity for any wrong done to that right or estate. It is urged that the party vested with the legal title is the only person permitted to sue at law, although the suit be for the benefit of another party having the equitable right. That question is not in the record before us. The second and third counts of the declaration charged that the legal title was not in plaintiff, but in Wesley Deemer, his brother. The first count averred that the legal title was in the plaintiff. The defendants demurred to the declaration but pleaded over, and did not afterward in any way raise the question whether the action could be maintained on the ground now stated.

The court admitted, against the objection of defendants, a paper purporting to be the original will of Jacob Deemer, filed in the office of the county clerk of Pike county, and which appeared to have been recorded in said office. The part of the alleged will, and codicil thereto, relating to this litigation is as follows:

"I give and bequeath to my son, William Deemer, and to his lawful heirs, the following described lands, to-wit: The west half of the north-west quarter of section number twenty-one (21), also the north-west quarter of the south-west quarter of section number twenty-one (21), in township number seven (7), south of range number two (2),

west of the fourth principal meridian, in the county of Pike and State of Illinois, provided that he pay to my grandchildren, Jacob S. Wheeler and Wesley Wheeler, the sum of two hundred (200) dollars each, and to Charles Wheeler, Jose Wheeler, George W. Wheeler, Thomas J. Wheeler, Tilden Wheeler, Frank Wheeler, Elsie M. Wheeler, John Wheeler and Maud Wheeler the sum of five (5) dollars each,—the above named children being the bodily heirs of my deceased daughter, Rachel Wheeler. The payment of said sums of money shall be paid within two years from date of my death. Also to Thomas Wheeler, husband of my deceased daughter, Rachel Wheeler, the sum of five dollars.”

Second item of codicil: “In regard to former will in bequest to my son, William Deemer, I desire to change to read, to-wit: that he shall have use, benefit and control of west half of the north-west quarter and the north-west quarter of the south-west quarter of section number twenty-one (21) in town number seven (7), south of range number two (2), west of the fourth principal meridian, in the county of Pike and State of Illinois, during his lifetime only, and that at his death said lands shall go to his lawful heirs, provided that he makes payment as stated in the original will.”

The ruling is assigned as error on the ground that there was no evidence that the will was ever proved or admitted to probate, and it is replied that the objection of the defendants was not specific enough to raise that question.

A general objection to evidence goes to its competency or relevancy, and if a will which has not been probated is incompetent as evidence of a devise, a specific objection was not required. A general objection to evidence which is incompetent in any event is sufficient. (*Hardin v. Forsythe*, 99 Ill. 312.) The statutory provision as to what shall make a will effective in law is as follows: “And every will, testament or codicil, when thus proven



to the satisfaction of the court, shall, together with the probate thereof, be recorded by the clerk of said court, in a book to be provided by him for that purpose, and shall be good and available in law for the granting, conveying and assuring the lands, tenements and hereditaments, annuities, rents, goods and chattels therein and thereby devised, granted and bequeathed." (Rev. Stat. chap. 148, sec. 2.) The original jurisdiction to establish the validity of wills and admit them to probate is in the county court, and not in the circuit court as a court of law. It is true that the probate only establishes the original validity of the will, and the title of the devisee relates back to the testator's death and takes effect from that time; but such validity must be established by proof that the will was executed with the formalities required by law to render it effective as a will. But we regard the objection made as sufficiently specific to direct attention to the want of proof of probate. The objection is as follows: "Counsel for defendants further objected to the introduction of the will on the ground that no sufficient foundation was laid for the same." The objection was upon the ground that it was necessary to make further proof as a basis for the admission of the will. It was error to overrule the objection and admit the paper.

By the twenty-third instruction given at the request of plaintiff the court instructed the jury that under said will of Jacob Deemer the plaintiff became and was the owner of the land described in the declaration by a fee simple estate, and not by a life estate, simply. There was no evidence that Jacob Deemer owned the land, nor that the will had been proved so as to be operative as a devise to plaintiff. The court also refused to give an instruction asked for the defendants, that before they could find for the plaintiff they must find that he was the owner of the land. Plaintiff averred in his declaration that he was the owner of the premises in fee simple absolute, and that he was deprived of that estate by the

fraud and deceit of the defendants. His right of action depended upon proof of his ownership so alleged. It is argued, in reply, that it was not necessary to prove title in Jacob Deemer, because both parties claimed title through him. If that were true, it would not obviate the objection to the instruction that a will not probated conveys the title. But the title is not in litigation between parties claiming it from the same source. The suit is to recover damages for the consequences of a fraud practiced upon the plaintiff, and the question whether any injury was done to him, and the extent of it, depended upon his title or want of title to the premises.

On the question of damages the court gave this instruction:

"If you find defendants, Hicks and Hess, guilty as charged, if you find actual damages, the measure of such damages, if any, should be the difference between what Hicks gave for the land and what it was actually worth."

If plaintiff was damaged, the extent of his injury was the difference between the value of the actual title which he conveyed and the value of the title which the defendants represented to exist and which he was led to believe he did convey. The fraud alleged consisted only in the nature and extent of the title purchased, and if Hicks purchased the life estate for less than it was actually worth he is entitled to the benefit of his bargain. The price paid for property is generally admissible in evidence on the question of its value, but it is not conclusive, and the measure of damages is the difference between what, in fact, existed and what was represented.

The judgments of the Appellate Court and the circuit court are reversed and the cause is remanded to the circuit court.

*Reversed and remanded.*

PRENTISS D. CHENEY

v.

N. D. RICKS *et al.**Opinion filed October 19, 1900.*

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1. CO-TENANCY—*facts under which the liability to account may arise.* The liability of one co-tenant to account to another may arise either from receiving from a third party more than his share of the rents and profits or from appropriating to his own use more than his portion of the common estate, the remedy in such cases being by bill for accounting.

2. SAME—if co-tenant is not a wrongdoer he need account only for rents actually received. A tenant in common who is in possession of all the land but who has not ousted his co-tenant is liable only for the rents actually received after deducting all just charges.

3. ACCOUNTING—*proper manner of accounting for grain rent.* Where the rent received by one co-tenant is grain, which is for a time stored and afterwards sold for a profit, it is proper, on accounting, to charge him with all he received or had on hand and to credit him with amounts paid out for taxes and labor and to protect, store and market the grain received.

4. SAME—*interest should be claimed in the trial court.* In an action for accounting, interest should be claimed in the trial court, as the question cannot be raised for the first time on appeal.

*Cheney v. Ricks*, 87 Ill. App. 388, affirmed.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Christian county; the Hon. WILLIAM M. FARMER, Judge, presiding.

FRANK P. DRENNAN, for appellant.

PROVINE & PROVINE, and JAMES B. RICKS, for appellees.

Mr. JUSTICE HAND delivered the opinion of the court:

This was a bill in chancery originally brought by N. D. Ricks and appellees Maxon and Provine, against Prentiss D. Cheney and others, praying that partition be made of a number of tracts of land in Christian county,

aggregating 5481 acres, owned by the complainants and Prentiss D. Cheney as tenants in common, in the following proportions, viz., the complainants an undivided two-fifths and Prentiss D. Cheney an undivided three-fifths part thereof. Prentiss D. Cheney filed a cross-bill, in substance admitting the allegations of the original bill except as to 1920 acres of the land, which he claimed to own absolutely. Answers and replications were filed. The cause was referred to a master in chancery and submitted to the court upon proofs taken and the master's report. A decree was entered dismissing the cross-bill and finding the title in the respective parties as stated in the original bill, and commissioners were appointed to make partition of the premises. Prentiss D. Cheney perfected an appeal to this court and the decree was affirmed in part. (*Cheney v. Ricks*, 168 Ill. 533.) The case was remanded, and on the 22d day of August, 1898, a decree was entered confirming the report of the commissioners and referring the case again to a master in chancery "to take and state the account of rents and profits received from said lands" by either of said parties in excess of his or their share since March 10, 1895; also of the taxes and other expenses or allowances paid by said parties, or either of them, in excess of his or their share since that time. Upon the master's report coming in, the court found that appellees Maxon and Provine had received rents and profits from said lands, including the value of products on hand, after making all proper allowances and deductions, to the amount of \$1817.23 in excess of their share thereof, and decreed that they pay that sum to Prentiss D. Cheney, from which decree Prentiss D. Cheney prayed an appeal to the Appellate Court for the Third District. That court affirmed said decree, and appellant has appealed to this court from such judgment of affirmance.

Appellees Maxon and Provine, from March 10, 1895, to August 22, 1898, received the rents and profits from

one-half of this land, which is one-tenth part thereof greater than they are entitled to take and use, and they are liable to account for such proportion to appellant. N. D. Ricks, pending the litigation, conveyed his interest in the land to Maxon and Provine, and the rent for 1898 was amicably adjusted. The lands held by appellees were cultivated by tenants, who paid them as rent therefor a portion of the crops grown thereon. In the statement of the account appellees were charged with the rents actually received by them, and not with the rental value of the lands. This appellant claims was erroneous, and insists mainly on a reversal of this case by reason thereof.

At the common law one tenant in common had no remedy against his co-tenant on account of rents and profits of the common estate unless the latter had been appointed bailiff of the former, in which case he was liable not only for actual receipts, but also for what he might have received by the exercise of reasonable diligence, or at least without willful fault, (Bacon's Abr. 32; Coke on Littleton, 209b; *Woolley v. Schrader*, 116 Ill. 29;) to remedy which hardship the Statute of 4 and 5 Anne, chap. 16, was enacted. (Freeman on Co-tenancy and Partition, sec. 270.) To the same effect is our statute. (1 Starr & Cur. chap. 2, sec. 1.) The liability of one co-tenant to account to another may arise either from receiving from a third party more than his share of the rents and profits, or from his appropriating to his own use more than his proportion of the common estate. (*Angelo v. Angelo*, 146 Ill. 629.) The remedy is by action to compel an accounting. (*Angelo v. Angelo*, *supra*.) Assumpsit will not lie. (*Crow v. Mark*, 52 Ill. 332.) The liability in this case is based upon the fact that appellees have received as rent more than their share of the profits of the common estate. The evidence does not show them to be wrongdoers, and the court did not err in requiring them to account only for what they had so received, and no more, after deducting

all just charges, for the law is well settled that a tenant in common in possession of all the land, but who has not ousted his co-tenant, is liable only for rents actually received. (11 Am. & Eng. Ency. of Law, p. 1102, and notes.)

The method pursued by the master in stating the account was, in our opinion, regular and in accordance with the usual practice in such cases. (*Patterson v. Johnson*, 113 Ill. 559.) The rent received was mostly grain, which was for a time stored by appellees and afterwards sold for a profit. Appellees were charged with all they received or had on hand, and allowed credit for taxes, labor and other disbursements paid out and expended by them in protecting and preserving the common estate and storing and marketing the grain rent received by them. A balance was struck and appellees decreed to pay to appellant the one-tenth part thereof. This was equitable and just and according to law.

It is insisted by appellant that he should have been allowed interest upon the sum found to be due him. No claim was made for interest in the trial court and the question cannot be raised in the Appellate Court for the first time, and so long as appellant was claiming to be the absolute owner of 1920 acres of the land no account could be stated.

The interests of the parties were undivided in the entire estate until the commissioners' report was confirmed, therefore there is no force in the contention of appellant that the 700-acre tract, which had been in the possession of appellees and which was assigned to him, should alone be taken into consideration in stating the account.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

JOHN A. BRADLEY *et al.*

v.

ALEXANDER DRONE *et al.**Opinion filed October 19, 1900.*

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1. COLLATERAL ATTACK—*proceeding to cancel administrator's deeds as clouds is a collateral attack.* A bill for partition and to set aside as clouds on complainant's title deeds acquired by the defendants under an administrator's sale is a collateral attack upon the proceedings of the county court under which the sale was had.

2. SAME—*on collateral attack presumptions are in favor of jurisdiction of the court.* In case of a collateral attack upon the proceedings of the county court nothing is presumed to be out of its jurisdiction except that which specially appears to be so.

3. SAME—*mere irregularities are not sufficient basis for collateral attack.* Mere irregularities in the proceedings of the county court with reference to an administrator's sale do not afford a basis for collateral attack.

4. JURISDICTION—*when it will be presumed that court had jurisdiction of defendants.* Where an administrator's order of sale recites that all of the defendants have been duly served with process or by publication, as the law requires, more than the lawful time prior to the sitting of the court, it will be presumed on collateral attack, even if the summons in the record is void and the certificate of publication defective, that another and proper summons was issued and served and that proper publication was had and a correct certificate of notice and of publication was before the court.

WRIT OF ERROR to the Circuit Court of Gallatin county;  
the Hon. CARROLL C. BOGGS, Judge, presiding.

This is a proceeding by bill in chancery, filed by plaintiffs in error in the circuit court of Gallatin county, at the September term, 1892, to partition certain real estate, and to remove as clouds upon their title the deeds of defendants in error acquired by virtue of an administrator's sale of lands belonging to the estate of Joshua Bradley, deceased.

In substance, the bill alleges that on November 25, 1896, Joshua Bradley died intestate, leaving complainants and others his heirs-at-law, and owning at the time of his death about three hundred acres of farming land,

a part of which was his homestead, and a number of lots in the town of Bartley; that the administrator, on September 19, 1878, filed in the county court of that county a petition to sell real estate to pay debts of the estate, showing the debts to be \$4065.55 in excess of personal assets; that the petition was not in conformity with the statute and was therefore insufficient to give the court jurisdiction; that the summons issued in said cause was not legal; that the publication notice to Mary E. Evans, a non-resident and one of the heirs, was void; that at the December term following, a decree was entered finding "that all of the defendants have been duly served with process or by publication in a newspaper, as the law requires, more than the lawful time prior to the sitting of the court, and the court doth find that this court has jurisdiction both of the parties defendant and complainant and the subject matter of this suit," and ordering the land to be sold, setting forth terms, place of sale, etc. The bill further alleges that said statement as to the finding of the county court as to the service and jurisdiction was untrue; that in pursuance of said order of sale the administrator, on the 28th day of March, 1879, sold the said premises; that the deceased left an infant son, who was entitled to a homestead right, but that said right was not adjudicated or assigned to him; that the complainants, being the heirs-at-law of the deceased, are still owners of the premises as tenants in common. The prayer is that the court decree that the said proceedings of the county court were without jurisdiction, and that the sale by the administrator, and the deeds executed by him, and all conveyances and deeds thereunder, be held to be void and clouds upon the title of complainants; that an account be taken of rents and profits, and that the land be divided.

After general demurrer being overruled, the defendants filed answers, admitting the allegations as to the administrator's sale but denying that the proceedings



were in any way illegal and void; admitting that no homestead estate was assigned to the infant son of the deceased, but denying that he was entitled to such an estate. Upon a hearing at the February term, 1896, the bill was dismissed for want of equity. Complainants now prosecute this writ of error to reverse that decree.

JESSE E. BARTLEY, GEORGE W. PILLOW, and CARL ROEDEL, for plaintiffs in error:

The county court, in proceedings to sell real estate to pay the debts of an intestate, derives its jurisdiction from the statute alone, and no presumption arises to support its action in any given particular. Every essential fact necessary to such jurisdiction must appear affirmatively of record, as nothing shall be intended or presumed to be within its jurisdiction. *Payson v. People*, 175 Ill. 267; *Railroad Co. v. Galt*, 133 id. 657.

The summons, printer's certificate of publication and clerk's certificate of mailing notice to a non-resident defendant are as much a part of the record in the case as is the decree. *Donlin v. Hettinger*, 57 Ill. 348; *Randall v. Songer*, 16 id. 27; *Payson v. People*, 175 id. 267.

By a collateral proceeding is to be understood any proceeding which is not instituted for the express purpose of annulling, correcting or modifying a judgment or decree. Vanfleet on Collateral Attack, sec. 3; 12 Am. & Eng. Ency. of Law, (1st ed.) 147.

A suit in equity to impeach a decree and annul an administrator's deed based thereon is a direct attack and not a collateral proceeding. *Hurlbut v. Thomas*, 55 Conn. 181; Vanfleet on Collateral Attack, sec. 2; *McCampbell v. Durst*, 73 Tex. 410; *Borders v. Hodges*, 154 Ill. 478.

W. S. PHILLIPS, and C. S. CONGER, for defendants in error:

Where the record of a judgment or decree is collaterally attacked jurisdiction will be presumed, although it

be not alleged in the decree thus attacked or fails to appear in such decree; and such presumption of jurisdiction cannot be overcome or destroyed by any extrinsic evidence, but only when the record itself shows there was no jurisdiction. *Field v. Peeples*, 180 Ill. 376; *Harris v. Lester*, 80 id. 307; *Spring v. Kane*, 86 id. 580; *Matthews v. Hoff*, 113 id. 90; *Swearengen v. Gulick*, 67 id. 208; *Turner v. Jenkins*, 79 id. 228; *Propst v. Meadows*, 13 id. 157.

In collateral attacks, where a void summons or publication is found among the files, and the record finds due service or publication, it will be presumed in support of jurisdiction that some other and proper summons or publication was proven to the court. *Reddick v. Bank*, 27 Ill. 145; *Harris v. Lester*, 80 id. 307; *Moore v. Neil*, 39 id. 256.

The county court is a court of general jurisdiction in reference to sale of lands by administrators. Every presumption will be indulged in favor of their jurisdiction, and this presumption can only be overcome, in a collateral proceeding, when its own record shows there was no jurisdiction. *Field v. Peeples*, 180 Ill. 376.

MR. JUSTICE WILKIN delivered the opinion of the court:

As a basis for asking the removal of the administrator's deeds as clouds upon the title of plaintiffs in error, it is urged that the proceedings in the county court under which the real estate in question was sold were wholly without jurisdiction, and void. This is clearly a collateral attack upon the proceedings of the county court. In *Moore v. Neil*, 39 Ill. 256, (a similar case then before this court,) it was held that such a proceeding as this, where the defendant's title derived from the administrator's sale is sought to be divested, is as purely collateral as an action of ejectment. (*Swearengen v. Gulick*, 67 Ill. 208; *Harris v. Lester*, 80 id. 307; *Spring v. Kane*, 86 id. 580; *Matthews v. Hoff*, 113 id. 90; *Field v. Peeples*, 180 id. 376.) Being a collateral attack upon the county court proceedings, the rule is that nothing is presumed to be out of its

jurisdiction but that which specially appears to be so. In *Matthews v. Hoff*, *supra*, where the jurisdiction of the county court was attacked collaterally, we said (p. 96): "Every presumption will be indulged in favor of the jurisdiction of a court of general jurisdiction, and county courts in this State are courts of general jurisdiction with respect to all matters coming within the purview of their jurisdiction as given by law." See, also, *Field v. Peebles*, *supra*, and cases cited.

The petition of counsel for plaintiffs in error is, that the record of the proceedings of the county court upon its face shows an absence of jurisdiction, because, it is said, the petition filed by the administrator, asking for an order to sell real estate to pay debts, fails to allege the necessary facts with reference to amount of claims allowed, the estate on hand and the manner of disposing of the same, and the amount of claims paid. While we are satisfied the petition is a substantial compliance with the requirements of the statute, the objections pointed out, if well founded, are at most but mere irregularities, and are not open to review in this collateral proceeding. There may be errors in the proceedings to sell land which might, on direct appeal, lead to a reversal of the order; but where, as here, the proceeding to sell is attacked collaterally, as is held in the case last above cited it can not be defeated or impeached for mere errors.

It is next contended the summons issued on the day the petition was filed, and being made returnable to the November term following, was void because the October term of the county court intervened, it being insisted that the petition should have been addressed to the first term thereafter (the October term) and the summons made returnable to that term. The decree which was rendered at the December term following, as shown by the foregoing statement, recites that "all of the defendants have been duly served with process or by publication in a newspaper, as the law requires, more than the lawful

time prior to sitting of the court, and the court doth find that this court has jurisdiction both of the parties defendant and complainant, and the subject matter of the suit," etc. Even conceding the summons of September 19 void for the reasons urged, yet from the finding that due service by summons was had upon the defendants it will be presumed, in a collateral attack, that another and proper summons was issued and served. "All reasonable presumptions are in favor of the jurisdiction of the court, and the law will presume, *prima facie*, at least, from the finding of the court, that such was the fact; that such summons, with the proper return on it, was before the court and may have been abstracted or lost from the files." *Matthews v. Hoff*, *supra*, and cases cited.

It is also said the publication notice to non-resident Mary E. Evans was based upon the void summons of September 19, and no presumption that a proper publication was had can be indulged because there was not sufficient time for such notice. As in the case of personal service of summons, it will be presumed from the recitals of the decree as to the jurisdiction, that, in ample time before the decree was rendered, proper publication notice was had and a correct certificate of mailing of notice and of publication was before the court. The defective certificate of publication and mailing, which appears in the record, is not the only evidence of that fact, and we must presume that other evidence was offered as a basis for the finding of the court. *Barnett v. Wolf*, 70 Ill. 76; *Harris v. Lester*, *supra*.

It being established that the bill of complainants must be treated and considered as an attempt to collaterally attack the proceeding by the administrator and his deeds to the several purchasers, and that the county court had jurisdiction both of the subject matter and the persons of the heirs of the intestate, all other alleged errors are unavailing as grounds for declaring void and setting aside that proceeding and the conveyances thereunder. The

failure to set off the homestead of the infant, and the other errors urged, are, at most, but mere irregularities intervening in the county court and upon the administrator's sale, and, as we have shown above, cannot be availed of in a collateral attack. We deem it unnecessary, therefore, to give further attention to them.

The decree of the circuit court dismissing the bill will be affirmed.

*Decree affirmed.*

MR. CHIEF JUSTICE BOGGS having heard this cause in the circuit court took no part in the decision here.

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WILLIAM D. BOYCE

v.

TAYLOR A. SNOW.

*Opinion filed October 19, 1900.*

1. LIMITATIONS—*provision extending time one year in case of non-suit.* The provision of the Statute of Limitations which extends the time for bringing an action one year in case of non-suit, where the time limited for bringing suit has expired during the pendency of the action, contemplates only involuntary non-suits.

2. NON-SUIT—*what is an involuntary non-suit.* If the parties are in court by their attorneys, and the plaintiff's attorney declines to proceed when the case is called for trial but does not ask for a non-suit, the judgment of the court ordering a non-suit of its own motion and authorizing the defendant to recover his costs is an involuntary non-suit.

3. SPECIAL INTERROGATORIES—*when court may refuse to give special interrogatories.* Special interrogatories, all relating to mere evidentiary facts, and which, if answered favorably to the party presenting them, would not control the general verdict, are properly refused by the court.

4. The facts in this case being substantially the same as in the case of *Boyce v. Tallerman*, 183 Ill. 115, the law announced in that case must control this.

*Boyce v. Snow*, 88 Ill. App. 402, affirmed.

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APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. M. A. KAVANAGH, Judge, presiding.

O. W. DYNES, for appellant.

EDWARD B. BURLING, for appellee.

Per CURIAM: This is an appeal from a judgment of the Appellate Court affirming a judgment obtained by appellee against appellant in the superior court of Cook county. In the decision of the case the Appellate Court filed with its judgment the following opinion by Mr. Justice ADAMS:

“Appellee, plaintiff in the trial court, sued appellant, defendant in that court, in case, for negligence resulting in injury to the plaintiff, and recovered judgment for the sum of \$2000, from which judgment this appeal is. The suit was commenced January 18, 1898, and the accident which occasioned the injury occurred November 20, 1894. The defendant pleaded the general issue and the Statute of Limitations, which limits the bringing of suit in such cases to two years from the time when the cause of action accrued. To the plea of the statute the plaintiff replied as follows:

“‘And the plaintiff, as to the plea of the defendant by him secondly above pleaded, says that he, the plaintiff, by reason of anything in that plea alleged, ought not to be barred from having his aforesaid action, because, he says, that the causes of action in his said declaration set up for which he brought suit, accrued to the plaintiff on the 28th of November, 1894, and the plaintiff says that within two years thereafter, to-wit, on the 9th day of March in the year 1896, he, the plaintiff, began suit against the defendant in this suit, and the said suit so begun was general No. 172968 in the superior court of Cook county, Illinois, and the said suit No. 172968 was brought for the

same causes of action for which this suit is brought; and the plaintiff says that thereafter, to-wit, on the 8th day of December, A. D. 1897, a judgment of non-suit was rendered by the said superior court against him, the plaintiff, in the said suit No. 172968, in the words and figures following:

“Taylor A. Snow v. National Electric Construction Company, University Club and William D. Boyce.	}	Case.
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“‘This day come the parties hereto, by their attorneys, respectively, and the jury empaneled herein, as aforesaid, also come, and thereupon the plaintiff declines to proceed with the trial of said cause, and the court orders a non-suit in this cause. Therefore it is considered by the court that the defendants, National Electric Construction Company, University Club and William D. Boyce, do have and recover of and from the plaintiff their costs and charges in this behalf expended, and have execution therefor.’

“‘And the plaintiff says that he was in the said suit No. 172968 thereby non-suited, and within one year thereafter, to-wit, on the 18th day of January, 1898, he, the plaintiff, began his above entitled suit against this defendant, and the plaintiff says that this his said suit as above entitled is brought for the same causes of action as said suit No. 172968, wherein the said plaintiff was non-suited, as aforesaid; and this the plaintiff is ready to verify by the record in said suit No. 172968, wherefore he prays judgment and his damages, etc., to be adjudged to him,’ etc.

“The defendant demurred to this replication, and the demurrer was overruled by the court. The legal question presented is whether the non-suit mentioned in the replication was voluntary on the part of the plaintiff or involuntary. If the former, the replication is bad; if the latter, it is good.

“The Statute of Limitations contains the following provision: ‘If the plaintiff be non-suited, then if the time limited for bringing such action shall have expired dur-

ing the pendency of such suit, the said plaintiff, his or her heirs, executors or administrators, as the case shall require, may commence a new action within one year after such judgment reversed or given against the plaintiff, and not after.' (2 Starr & Cur. Stat. p. 2642, par. 25.)

"This provision applies solely to involuntary non-suits, such as are known to the common law, and not at all to voluntary non-suits, such as are permitted by section 49 of the Practice act. (*Holmes v. Chicago and Alton Railroad Co.* 94 Ill. 439; *Gibbs v. Crane Elevator Co.* 180 id. 191.) In the former case the court defined and distinguished between voluntary and involuntary non-suits, saying: 'A voluntary non-suit is said to be an abandonment of a cause by a plaintiff and an agreement that a judgment for costs be entered against him; but an involuntary non-suit is where a plaintiff, on being called when the case is before the court for trial, neglects to appear, or when he has given no evidence upon which the jury could find a verdict.' The court cites Jacobs' Law Dictionary, in which it is said: 'A non-suit can only be at the instance of the defendant,' etc.,—which language refers to involuntary non-suits; and after citing other authorities the court say: 'Thus we see by the common law practice there was no non-suit except on the motion of the defendant.' See, also, 2 Tidd's Pr. 867, 868, to the same effect as Jacobs' Dic. cited *supra*.

"In *Elmore v. Grymes*, 1 Pet. 469, the court, Marshall, C. J., delivering the opinion, say: 'The court has had this case under consideration, and is of opinion that the circuit court had no authority to order a peremptory non-suit against the will of the plaintiff. He had a right, by law, to a trial by jury and to have had the case submitted to them. He might agree to a non-suit, but if he did not so choose the court could not compel him to submit to it.' Neither the report of the case nor the opinion discloses the particular circumstances under which the order of non-suit was entered.



"In *Herring v. Poritz*, 6 Ill. App. 208, the court, McAllister, J., delivering the opinion, distinguish between voluntary and involuntary non-suits, and say: 'An involuntary non-suit takes place when the plaintiff, on being called when his case is before the court for trial, neglects to appear, or when he has given no evidence on which a jury may find a verdict.—*Pratt v. Hull*, 13 Johns. 334. See, also, Bacon's Abr. tit. 'Non-suit,' 214; 2 Tomlin's Law Dic. same title.'

"In *Delano v. Bennett*, 61 Ill. 83, the cause was called for trial, the parties being present by their attorneys, when the plaintiff's attorney objected to it being tried, which objection the court overruled and called a jury, when the plaintiff's attorney, without submitting to a non-suit, withdrew from the case. The jury returned a verdict for the defendant and judgment was rendered on the verdict, from which the plaintiff appealed, and, on appeal, urged, as ground for reversal, that the court erred in not entering judgment as in case of a non-suit. The court say: 'If, when a cause is regularly called upon the docket, the plaintiff do not appear, the court should dismiss the suit for want of prosecution and render judgment as in case of non-suit. But if he appear and is present when the trial commences, then, though he object to the cause being tried, yet if he desire a non-suit he must make his desire known by asking for it. The equivocal act of counsel withdrawing from the cause is not a withdrawal of the cause from the court.' This is in accordance with the text of Tidd, where the author says: 'But where the case turns on a question of fact, it ought to be submitted to the jury, unless the plaintiff's counsel expressly assent to being non-suited, a mere tacit acquiescence not being, it seems, sufficient.' 2 Tidd's Pr. 867.

"In the present case, as in the case of *Delano v. Bennett*, *supra*, the parties were in court by their attorneys when the case was called for trial, and the plaintiff's attorney did not ask for a non-suit but merely declined to proceed

with the trial. Under these circumstances we think it clear, in view of the authorities cited, that the non-suit was involuntary and that the demurrer was properly overruled. The question whether the entry of judgment, as in case of a non-suit, by the court of its own motion, was or not erroneous, is not involved, because whether such judgment was right or wrong does not affect the question whether it was voluntary or involuntary on the part of the plaintiff.

"The accident which occasioned the injury was the falling of a high smoke-stack erected in the rear of the defendant's premises, and the upper part of which was fastened to his building, upon the sky-light of a building in the rear of the defendant's premises, under which sky-light the plaintiff was standing when the smoke-stack fell. There was evidence in the case to the effect that the smoke-stack was erected partly on the ground of an adjoining proprietor and partly on ground leased by the defendant to the adjoining proprietor. In view of this evidence the defendant's attorney asked certain instructions, to the effect that in such case the tenant, and not the landlord, is responsible, which were refused by the court. In the recent case of *Boyce v. Tallerman*, 183 Ill. 115, the facts were substantially the same as in the present case, and the court, construing a lease from Boyce to the University Club, the adjoining proprietor above mentioned, (which lease is in evidence in the present case,) held, as matter of law, that Boyce was directly responsible. We therefore think there was no error in refusing the instructions. The court gave to the jury thirteen instructions on behalf of the defendant, and we think the jury was fully and fairly instructed, and that there was no error in the refusal of any instruction.

"Defendant's attorney requested the court to submit to the jury eleven special interrogatories, but the court refused to so submit any of them. The interrogatories all relate to mere evidentiary facts, and the answer to

none of them, even if favorable to the defendant, could control the general verdict. Therefore, the court properly refused to submit them to the jury.

"In *Boyce v. Tallerman*, *supra*, the court held Boyce liable, and the facts in that case being substantially the same as in this, the law announced by the court in that case must control this."

After what we have said in *Boyce v. Tallerman*, *supra*, it is unnecessary to say more than that we concur in the views expressed in the foregoing opinion of the Appellate Court, and we adopt the same as our opinion.

*Judgment affirmed.*

ENNO STAUDE *et al.*

*v.*

ELVIRA SCHUMACHER *et al.*

*Opinion filed October 19, 1900.*

**PRACTICE**—*appellant must furnish abstract of record complying with rule.* The party bringing a case to the Supreme Court for review must furnish a complete abstract of the record, properly indexed, such as will fully present the errors relied upon and be sufficient for the examination and determination of the questions involved without resort to the written record.

WRIT OF ERROR to the Circuit Court of Washington county; the Hon. M. W. SCHAEFER, Judge, presiding.

UPTON M. YOUNG, ALEXANDER YOUNG, and WILLIAM H. BENNETT, for plaintiffs in error.

CHARLES T. MOORE, and JAMES A. WATTS, for defendants in error.

Mr. JUSTICE HAND delivered the opinion of the court:

The complainants filed a bill in chancery in the circuit court of Washington county, "the single object of which," as stated in their brief filed in this court, "is to cancel

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102a	846

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106a	578
106a	580

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208	80
110a	589

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112a	56
112a	631

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118a	630

the last will and testament of Robert Staude, deceased, to set aside the probate thereof and distribute the estate of said Robert Staude according to law." The court sustained a demurrer thereto, and the complainants electing to stand by their bill, a decree was entered dismissing the bill, and for costs. This writ of error is sued out to reverse such decree.

In conflict with the complainants' brief the abstract states: "The prayer of the bill is in the usual form in such cases, and asks for the cancellation of the will and codicils of said *Augustus* Staude, deceased." The exhibits attached to the bill are not abstracted, the abstract contains no assignment of error and is not indexed.

The rules of this court require the party bringing a cause into this court to furnish a complete abstract or abridgment of the record, properly indexed,—such an abstract as will fully present every error and exception relied upon, and sufficient for the examination and determination of the case without an examination of the written record. In the case of *Gibler v. City of Mattoon*, 167 Ill. 18, we said (p. 22): "It is the duty of parties bringing cases here for review to prepare and file complete abstracts of the record in accordance with the rules, and such abstracts as we can safely rely upon. It is not our duty to perform this work of counsel, which, in detail, as to them is inconsiderable, but when imposed upon us is, in the aggregate, extremely burdensome."

The decree must be affirmed for want of a complete abstract. We have, however, carefully read the briefs, from which it appears there is no substantial error in the decree, and no error which, in the present state of the record, can be availed of by plaintiffs in error.

The decree will be affirmed.

*Decree affirmed.*

ISAIAH B. LIBBEY *et al.*187 189  
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v.

THE CITY OF CHICAGO.

*Opinion filed October 19, 1900.*

This case is controlled by the decision in *Jacobs v. City of Chicago*, 178 Ill. 560, which follows *Holden v. City of Chicago*, 172 id. 263.

WRIT OF ERROR to the County Court of Cook county;  
the Hon. C. M. BARICKMAN, Judge, presiding.

WILLIAM F. CARROLL, and M. F. CURE, for plaintiffs  
in error.

CHARLES M. WALKER, Corporation Counsel, ARMAND  
F. TEEFY, and WILLIAM M. PINDELL, for defendant in  
error.

Per CURIAM: This is a writ of error to the county court of Cook county to reverse a judgment confirming a special assessment for the improvement of a street in Chicago. The ground of reversal insisted upon is, that the ordinance under which the assessment was made fails to specify the nature, character or description of the improvement, in that it does not prescribe the height of the combined curb and gutter or state where the curb is to be placed. The cause is in all respects like that of *Jacobs v. City of Chicago*, 178 Ill. 560, followed by *Dickey v. City of Chicago*, 179 id. 184. See, also, *Newkirk v. City of Chicago*, 180 Ill. 142. On the authority of these cases the judgment of the county court will be reversed and the cause remanded.

*Reversed and remanded.*

WILLIAM L. WALLEN

v.

SILAS M. MOORE.

*Opinion filed October 19, 1900.*

1. PLEADING—*when cross-bill is not necessary to granting of affirmative relief.* If a junior encumbrancer is made a party to a suit to foreclose the superior encumbrance, a cross-bill is not necessary to entitle him to prove his claim and have satisfaction thereof out of any surplus above the superior encumbrance.

2. APPEALS AND ERRORS—*Appellate Court may assess damages for prosecuting appeal for delay.* The Appellate Court may assess damages where an appeal appears to have been prosecuted for delay, and the Supreme Court will not review the exercise of such power unless there has been an abuse of discretion.

*Wallen v. Moore*, 88 Ill. App. 287, affirmed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. FARLIN Q. BALL, Judge, presiding.

GEORGE E. LEONARD, for appellant.

ULLMANN & HACKER, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Charles H. Lawrence secured his note to appellee, Silas M. Moore, for \$3500, with interest at seven per cent, by a trust deed on block 3 in Wallen & Probst's third addition to Oak Park, in Cook county. Lawrence sold the property, subject to said trust deed, to William L. Wallen, appellant, and Jerome Probst, and took from them a second trust deed to Otis R. Glover, trustee, on said block and five other blocks in said addition, to secure notes of said Wallen and Probst, which he sold and transferred to Margaret Lawrence. Appellee filed his bill in the superior court of Cook county to foreclose said first

trust deed executed to him, and made all said parties defendants. Margaret Lawrence answered the bill, alleging her ownership of said notes secured by the second trust deed, and upon a reference to the master she made proof of the notes and trust deed. The master reported that the complainant was entitled to a decree of foreclosure of the first trust deed; that there was due the defendant Margaret Lawrence, on the notes secured by the second trust deed, \$38,811.43, and that she was entitled to have said amount paid out of any surplus arising from the sale of the premises. The defendant Wallen excepted to the finding that his co-defendant, Margaret Lawrence, was entitled to any surplus. The exceptions were overruled and the report was approved, and a decree was entered accordingly. From that decree the defendant Wallen was allowed an appeal to the Appellate Court, which affirmed the decree, and, being of the opinion that the appeal was prosecuted for delay, entered judgment for two and a half per cent of the amount found due the complainant, as damages for such delay. A reversal is asked on the grounds that the superior court granted affirmative relief to the defendant Margaret Lawrence upon her answer, and that this was not a proper case for the allowance of damages by the Appellate Court.

It is a well established rule that where junior encumbrancers are made parties defendant to a foreclosure suit, a cross-bill is not necessary to enable them to participate in the distribution of a surplus. A defendant in such case can prove his claim, and if there is a surplus above the superior encumbrance he may have satisfaction out of it. (*Soles v. Sheppard*, 99 Ill. 616.) Counsel does not seem to deny that rule, but says that there were two other decrees foreclosing trust deeds upon other blocks included in the trust deed securing the defendant Margaret Lawrence, and the same provision for the payment of any surplus to her was made in each of them, and therefore this decree is erroneous because, if there should be a sufficient

surplus in each instance, she would receive the whole amount of her debt three times. The record in this case does not show the existence of the other decrees as alleged; but if there are such other decrees for the same debt, one satisfaction of the debt will satisfy them all.

There are six blocks included in the trust deed securing the notes held by Margaret Lawrence, and it is argued that a provision is erroneous and inequitable by which a satisfaction of the trust deed may result from the sale of one block. The argument is, that if the six blocks are owned by different persons and a satisfaction of the trust deed should result from the sale of block 3, the entire encumbrance would be thrown upon the owners of that block while the owners of the others would escape all liability. If there are any equities of that kind they are not exhibited by the record and were not brought into the suit in any way. If other parties owned the remaining blocks subject to the trust deed the fact is not shown and they were not parties to this suit, and if there was any right to an apportionment of the lien the question was not presented to the superior court. So far as appears, Margaret Lawrence had a right to obtain satisfaction out of any part of the premises subject to the trust deed. If it turns out that the owners of block 3 are obliged to pay more of the lien than they are equitably liable to pay, they will have to seek relief in some other way against any person who is equitably bound to them.

The only other proposition presented here is, that the appeal to the Appellate Court was not prosecuted for delay, and therefore the allowance of damages was wrong. The Appellate Court may assess damages where an appeal appears to have been prosecuted only for delay, and we will not review the exercise of such power unless there has been an abuse of the discretion. (*Baker v. Prebis*, 185 Ill. 191; *Town v. Alexander*, id. 254.) We cannot say that the discretionary power reposed in the Appellate Court was abused in this instance. A similar motion for



the assessment of damages in this court has been made by appellee. We are not satisfied that there should be an additional assessment on this appeal, and the motion is denied.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

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JAMES RANN

v.

MARY McTIERNAN *et al.*

*Opinion filed October 19, 1900.*

1. **PARTITION**—*a parol partition does not vest legal title in severalty.* A parol partition of land does not vest the legal title in the parties in severalty, but to have that effect the partition must be accompanied by the execution of deeds.

2. **SAME**—*time within which deed should be made under partition decree.* The time within which a deed may be executed under a partition decree, declaring title to be held in trust and directing a conveyance, is the same as is provided by statute for the execution of a deed pursuant to a certificate of sale, and hence a deed made more than twenty years after the decree, and without any new order of court, is unauthorized.

3. **SAME**—*power of court to carry partition decree into effect.* A decree entered to confirm a parol partition, which declares the legal title to be held in trust and directs a conveyance thereof, may, in the absence of intervening rights of third parties, be carried into effect by the court at any time by decreeing the title to be in the party entitled to the conveyance.

APPEAL from the Circuit Court of Grundy county; the Hon. H. M. TRIMBLE, Judge, presiding.

C. F. HANSON, and HALEY & O'DONNELL, for appellant:

A deed should not be executed by an officer to carry into effect a judgment or decree of a court where a long time has elapsed since the entry of the judgment, and in

case of a lapse of eight years, by analogy to the limitation laws, a presumption is raised that there has been a redemption or a release. *Schrader v. Peach*, 77 Ill. 615.

A naked power must be strictly pursued, and a commissioner appointed by a decree in chancery, who, after the death of the parties, executes a deed, does so without authority, and the deed is void. *Welch v. Louis*, 31 Ill. 446.

By analogy to the Statute of Limitations, a deed should not be executed to carry into effect a judgment more than twenty years after its entry, nor should any order be entered by any court authorizing such deed after such lapse of time. Lapse of time should be considered an insuperable bar to execution of judgment. *Rucker v. Dooley*, 49 Ill. 377; *Harmon v. Larned*, 58 id. 167; *Conwell v. Watkins*, 71 id. 488; *Cottingham v. Springer*, 88 id. 90.

Where a party to a decree has rested during the longest period known to the Statute of Limitations without obtaining a deed from the commissioner, the law will presume that he had released his claim under the decree, or that it has in some legal manner been discharged. *Schrader v. Peach*, 77 Ill. 615; *Peterson v. Emmerson*, 135 id. 55.

Equity adopts, by analogy, the Statute of Limitations, and will refuse to permit a bill to review a decree in chancery after the lapse of five years. *Dolton v. Erb*, 53 Ill. 289; *Pestel v. Primm*, 109 id. 353.

In this State all remedies upon a judgment are lost and the judgment itself is absolutely barred in twenty years. *Smith v. Stevens*, 133 Ill. 183.

Under section 46 of chapter 22 the execution of a decree according to the terms of this section can only be completed in the manner therein directed.

A partition of land in chancery is not completed until conveyances are executed of the several allotments, and where no such conveyances are made or possession taken in pursuance of the decree, title does not vest. *Sontag v. Bigelow*, 142 Ill. 151; *Wadhams v. Gay*, 73 id. 415; *Gay v. Parpart*, 106 U. S. 699.

E. L. CLOVER, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The appellee Mary McTiernan, a sister and one of the heirs-at-law of Patrick Rann, deceased, filed her bill in the circuit court of Grundy county against the appellant, James Rann, and others, asking for a partition of the north-east quarter of the south-east quarter and the south-west quarter of the south-east quarter of section 16, township 31, in said county. The amended bill alleged title in the heirs of said Patrick Rann, and there was and is no dispute as to the title of the south-west quarter of the south-east quarter being in said heirs. It was alleged that the legal title of the north-east quarter of the south-east quarter was of record in appellant, James Rann, and his brothers and sisters, as heirs of Thomas Rann, deceased, but that they were not the equitable owners of the same and held the title in trust for all the heirs of Patrick Rann. The heirs of Thomas Rann by answer claimed that he was the owner of this tract in fee simple and his heirs were vested with his title; that said Thomas Rann was in the exclusive hostile possession of the same for more than twenty years; that he acquired a paramount title by seven years' possession under claim and color of title with payment of taxes; that a decree of the circuit court of Grundy county, finding that Patrick Rann was the owner of said tract and ordering said Thomas Rann to execute a deed to him of the same, was not carried into effect for more than twenty years after its entry, and that a deed executed by a special master in chancery in pursuance of said decree was void. On a hearing the court found and decreed that the title of record to the tract in dispute was in said heirs of Thomas Rann, but that they held such title in trust for all the heirs of said Patrick Rann, and partition was ordered accordingly. The court found that the interests of all the defendants

were subject to a certain mortgage, and the parties have stipulated that the decree was erroneous in that respect but that the error assigned need not be passed upon, which assignment is withdrawn, and that said error shall be corrected in a future decree of the circuit court.

Patrick Rann had two brothers, James and Thomas, and they owned various tracts of land in Grundy county, the title of which was held by other persons in trust for them. A parol partition of these lands was made among the three brothers, and the eighty acres partitioned in this suit was set off to Patrick but the legal title was in John Weir. Patrick was never married. His brother Thomas married and lived upon a tract of land allotted to him in the parol partition. Patrick lived with Thomas and his family until about 1869, when Patrick disappeared and was gone about seven years, during which time his whereabouts were unknown. During this period the brothers James and Thomas procured conveyances from said John Weir of Patrick's land, each taking forty acres. James obtained a deed of the south-west quarter of the south-east quarter, adjacent to his land, and Thomas of the north-east quarter of the south-east quarter, adjoining his land. Patrick returned about 1876 and filed his bill in the circuit court of Grundy county to confirm the parol partition and obtain conveyances of his land, and for other purposes. During Patrick's absence James had died, leaving a widow and minor children. Thomas and said widow and heirs of James were made defendants. Thomas entered his appearance and made no defense, and was defaulted. The widow and heirs of James answered. The cause was heard, and the court confirmed the partition and found that the heirs of James held the tract conveyed to him by John Weir in trust for Patrick Rann, and ordered a conveyance to him of the same, which was made. The court also decreed that Patrick was the owner of the tract conveyed to Thomas by John Weir and now in dispute, and ordered Thomas to make,

execute and deliver to Patrick a deed of conveyance of said tract, and in default thereof a commissioner was appointed to make the same. This decree was entered December 21, 1878. Thomas did not make the conveyance and none was made by the commissioner until December 23, 1899, when a deed was made to the heirs of Patrick.

A parol partition of land does not vest the legal title in the parties in severalty, and so far as the legal title is concerned such a partition is not effectual but must be accompanied by a deed. (*Sontag v. Bigelow*, 142 Ill. 143.) Furthermore, at the time of the parol partition the legal title to the portion set off to Patrick was in John Weir. The decree did not purport to vest legal titles but provided for conveyances thereof, and it is contended that the deed executed in 1899, in pursuance of said decree, is void because more than twenty years had elapsed since the entry of the decree, so that the legal title never passed to Patrick or his heirs.

It has been held that a deed should not be executed by an officer to carry into effect a decree, without further order of the court, where a long time has elapsed since the entry of the decree. In *Schrader v. Peach*, 77 Ill. 615, it was said that a conveyance of land nearly thirty years after the decree ordering it, without a new order, would not pass the legal title. It was held that in such case the presumption would be that the person in whose favor the decree was rendered had released his claim, but if he had not, he should, upon proper notice to all parties, have applied for a further order of conveyance, and an order would not be granted where it would impair the rights of innocent purchasers for value or the bar of the Statute of Limitations had arisen. In *Rucker v. Dooley*, 49 Ill. 377, a deed was executed by a sheriff twenty-nine years after a sale on execution. The title and possession had passed to remote and innocent purchasers for a valuable consideration. It was held that the sheriff was not warranted in making the deed to the detriment of inno-

cent purchasers. It was said to be a fair and reasonable presumption that the debtor had adjusted the purchase with the purchaser and had neglected to take up the certificate. In *Harmon v. Larned*, 58 Ill. 167, a deed was executed by the sheriff without notice nine years after a sale, and it was held to be unauthorized. In *Cottingham v. Springer*, 88 Ill. 90, a sheriff's deed made more than eight years and three months after the judgment became a lien, and without an order of court, was held not to be void against the heirs of the judgment debtor, who took as mere volunteers. The case was distinguished from *Rucker's case*, where innocent purchasers were claiming against the sheriff's deed and where the decision was based on the injustice to such purchasers,

The time within which a deed may be made pursuant to a certificate of sale is now regulated by statute, but the reason for adopting the rule applies also to a decree such as the one between these parties, and the rule must be the same. (*Schrader v. Peach, supra.*) The deed by a spécial commissioner to the heirs of Patrick without a new order of the court was unauthorized, but whether it was sufficient to convey a legal title is not material. The decree declared the rights of the parties and found Patrick to be the owner of the forty acres in dispute. It was declared that the title was held in trust for him, and no rights or interests of parties intervened. The cases recognize the right of the court to carry into effect such a decree at any time, and if it was not properly done by the commissioner it could be done in this case by decreeing the title to be in Patrick.

The defendants entirely failed in their claims under the statutes of limitation. After the decree Patrick lived with his brother Thomas, and all of the land owned by the two was farmed by them together. Thomas did not have any adverse possession of the tract. The grain raised on all the land was sold and the expenses and taxes were paid out of the common fund. No account

was kept. Thomas died in 1882 and Patrick took charge of all the lands. Thomas left a widow and a family of small children. The widow conducted the house and Patrick did all the business and bought the provisions for the family. In 1889 the widow of Thomas died, and after that the girls did the work in the house and Patrick raised and sold the crops. As the children became old enough they took charge, and Patrick finally becoming old and infirm, dropped out of the field work and did the chores about the house. After the death of the widow Patrick was appointed guardian of the minor children, and in making an inventory he did not include the forty acres. The tract was not included in the description of Thomas' property, in the application for letters of administration or in the inventory of his estate. The evidence shows that Patrick desired that the whole of this land, both the forty acres of which he had a deed and the forty in dispute, should go, after his death, to the children of Thomas. This intention of making a will or giving the property to said children was never executed. He regarded himself as the owner of the land, and at the time of expressing his intention said he had the title of one forty and had another forty that was in court that was in the name of Thomas. There was some evidence that he thought the tract in question would go, after his death, to the children of Thomas, but what he intended in that respect was a testamentary disposition of his property, and what he did and said was insufficient for that purpose. Whatever his intention was, he never carried it out. The ownership of the land was adjudicated between the parties by the decree, and the title which was then adjudged to Patrick was never lost or conveyed by him.

The decree of the circuit court is affirmed.

*Decree affirmed.*

WILLIAM H. MARTIN

v.

BENJAMIN D. MARTIN.

*Opinion filed October 19, 1900.*

187	200
d103a	*601
187	200
e206	*521

1. **BENEFIT SOCIETIES**—*section 9 of act of 1893 construed*. Section 9 of the act of 1893, on fraternal societies, (Laws of 1893, p. 130,) providing that "the money \* \* \* to be paid \* \* \* by any society \* \* \* shall not be liable to attachment \* \* \* or other process, \* \* \* and shall not be seized, taken, appropriated or applied \* \* \* to pay any debt or liability of a certificate holder or of any beneficiary," etc., is designed only to protect the societies from legal process by creditors of their members or beneficiaries.

2. **GARNISHMENT**—*money paid over by benefit society to beneficiary's agent is liable to garnishment*. Money belonging to a beneficiary, collected by his agent on a benefit certificate issued by a society organized under the act of 1893, is liable to garnishment in the hands of such agent by a creditor of the beneficiary, since section 9 of the act of 1893 does not apply to money which had been paid over by the society.

*Martin v. Martin*, 87 Ill. App. 365, affirmed.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of McDonough county; the Hon. G. W. THOMPSON, Judge, presiding.

SWITZER & MELOAN, for appellant.

SHERMAN & TUNNICLIFF, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

The only question for decision on this appeal is, whether money belonging to a beneficiary, collected by his agent on a certificate issued by a fraternal beneficiary society organized under the act of June 22, 1893, is liable to garnishment in the hands of such agent by a creditor of the beneficiary or is exempt by virtue of section 9 of said act. Said section is as follows:



"Sec. 9. The money or other benefit, charity, relief or aid to be paid, provided or rendered by any society authorized to do business under this act, shall not be liable to attachment by trustee, garnishee, or other process, and shall not be seized, taken, appropriated or applied by any legal or equitable process, or by operation of law, to pay any debt or liability of a certificate holder, or of any beneficiary named in a certificate, or of any person who may have any right thereunder." (Hurd's Stat. 1897, p. 971.)

The question arose on demurrer of the garnisher to the answer of the garnishee, who had collected the money from the society and held it as the agent of the beneficiary. By the judgments of the circuit and Appellate Courts the demurrer was sustained and the money held liable to garnishment. We are of the opinion that no error has been committed and that the judgments are correct. We cannot find from the language used in said section 9 that it was the intention of the General Assembly to exempt altogether from legal process, and put beyond the reach of creditors of the beneficiaries, all moneys collected upon such certificates. It is clear that such money is exempt before it is paid by the society, and that the society itself cannot be garnished for such demands. The language of the statute seems to confine the exemption, so far as applicable to a case of this character, to money *to be paid* and not to extend it to money after it has been paid. Here it had been paid and the society was discharged. We are of the opinion that it was the purpose of the General Assembly to protect such associations, and the fund in their hands, from legal process by creditors of their members and their beneficiaries before payment, rather than to follow the money after it has been paid over into the hands of the beneficiary and exempt it there from his debts. Such was the construction given to a similar statute in *Bull v. Case*, 58 N. Y. Supp. 774. Some other cases are cited to the contrary

by appellant, but we regard the interpretation we have given the statute as the better one. It might prove a great embarrassment for such associations not organized for pecuniary profit, having a large membership, to be compelled to respond to legal process at the instance of creditors of beneficiaries seeking to collect their demands from the society as soon as the beneficiary's legal claim accrued. But whatever may have induced the enactment of this provision, we would not be authorized to extend, by construction, the exemption beyond the limit which the statute, by the language employed, seems to have fixed.

It is contended by counsel for appellee that to give the statute the construction contended for by appellant would render it unconstitutional, because, as it is said, the subject of a general exemption of the fund is not embraced in the title of the act. We do not deem it necessary to decide whether this would be so or not, but it may be said that, so far as the title may be looked to as an aid to the ascertainment of the meaning of the statute, it lends no support to the construction contended for by appellant, but rather to that insisted upon by appellee, for the title shows that the purpose of the act relates to the organization and management of such societies for the furnishing of life indemnity or pecuniary benefits to beneficiaries, and to the control of such societies,—that is, relates to their organization, management and control, and not to the exemption of the benefits, after they have been paid over to the members or their beneficiaries, from the payment of their debts. In cases of doubt, recourse may be had to the title of a statute to aid in determining its meaning. (23 Am. & Eng. Ency. of Law, 328.)

Agreeing, as we do, with the courts below in their construction of the statute, the judgment must be affirmed.

*Judgment affirmed.*

THE CAREY-LOMBARD LUMBER COMPANY

v.

J. RUSSELL JONES *et al.*

*Opinion filed October 19, 1900.*

187	208
192a	284
187	208
198	62

1. **MECHANICS' LIENS**—*lease authorizing lessee to erect building is not a building contract.* A lease providing for the erection of a building upon the demised premises by the lessee, which is to become the property of the lessor upon the termination of the lease, is not a building contract nor is the lessee a contractor, within the meaning of the Mechanic's Lien act.

2. **SAME**—*lessor authorizing lessee to erect building subjects his title to mechanic's lien.* A lessor who stipulates in the lease for the erection by the lessee of a building upon the demised premises, which is to become the property of the lessor upon the termination of the lease by expiration or otherwise, subjects his title to mechanics' liens arising from the erection of the building, notwithstanding the lease provides, under penalty of forfeiture, that the lessee shall permit no mechanics' liens to attach to the premises.

*Jones v. Carey-Lombard Lumber Co.* 87 Ill. App. 533, reversed.

**APPEAL** from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. W. CLIFFORD, Judge, presiding.

Appellant was petitioner in the circuit court of Cook county to enforce a lien against city lots in Chicago, owned by appellee J. Russell Jones, for lumber furnished to construct certain improvements thereon. Appellee Jones, and Elizabeth, his wife, together with T. C. Kane and David Meyer, were made defendants to the petition. Jones and wife alone answered, and upon replication a hearing was had, resulting in a decree in conformity with the prayer of the petition. On appeal the Branch Appellate Court for the First District reversed that decree and remanded the cause, with directions to dismiss the proceeding. This appeal is from that judgment.

The petition sets forth that the petitioner, on April 16, 1890, entered into a contract with the defendants Kane

and Meyer to furnish building materials for the erection of buildings on the lots, a copy of the agreement being attached, marked exhibit "A." By an amendment to the petition it is averred that the said Kane and Meyer at the time held a lease on the lots from Jones, a copy being attached, marked exhibit "D." It is also averred that buildings were erected in accordance with the terms of said lease, which became the property of Jones; that on December 1, 1896, Jones declared said lease forfeited and entered into possession, renting the same to other parties for an annual rental of \$1762.50, being \$262.50 in excess of the rent reserved in the lease to Kane and Meyer, and that the latter thereupon became and ever since remained insolvent.

Exhibit "D," the lease alleged to have been entered into between Jones and Kane and Meyer, bears date February 5, 1896, and the material parts of it, for the determination of the questions here involved, are as follows: The first clause is a contract in the usual form, for the leasing of the property from the first day of May, 1896, for a term ending April 30, 1901. The next clause provides for the payment of rent at the rate of \$1500 per annum, payable by installments, as stated. The next clause is as follows:

"It is further expressly understood and agreed that the said party of the second part shall, within four months from the date hereof, erect upon said premises buildings and other permanent improvements to cost not less than the sum of six thousand dollars (\$6000), the plans and specifications for which said improvements are to be submitted to the said party of the first part for his approval before the work thereon shall begin, and no buildings or other improvements of any kind shall be placed on said premises without first obtaining, in writing, such approval of the plans thereof by said party of the first part. It is further understood and agreed that all buildings, fences, walks and improvements, of every kind and

nature whatsoever, so erected or placed on said premises by the said party of the second part, shall, when placed thereon, become immediately a part of the realty and the property of the said party of the first part, and that upon the termination of this lease, either by limitation or otherwise, such buildings and improvements of every kind which shall have been placed upon said premises by said parties of the second part are to be at once delivered into the possession of said party of the first part, together with the ground herein demised. \* \* \* It is further understood and agreed that should said party of the first part desire to use the premises herein demised at any time after the expiration of the first year of the term hereof, for the purpose of erecting buildings thereon, or any other purpose, he shall have the right to terminate the said term upon first giving ninety days' written notice unto said parties of the second part of his intention so to do, and upon the payment to said parties of the second part, should such termination occur, pursuant to the right in this clause given, at any time during the second year of the term hereof, the sum of \$4800; or should such termination occur at any time during the third year of the term hereof, the sum of \$3600; or if at any time during the fourth year of the term hereof, the sum of \$2400; or if at any time during the fifth year of the term hereof, the sum of \$1200. It is further understood and agreed that for the cost of any of the buildings or improvements which may be made by the parties of the second part during the term of this lease they shall permit no mechanics' liens to attach to said premises, and that should said parties of the second part fail to keep this agreement, and the said party of the first part be obliged, in order to protect said premises, to pay off and discharge any such mechanics' liens, he shall have the right forthwith to terminate the term hereof, upon thirty days' notice to said parties of the second part, in writing, of his intention so to do. It is further under-

stood and agreed that the said second parties are to have the right, at any time subsequent to the execution hereof and prior to the beginning of the term of this lease, to enter upon said premises for the purpose of erecting or constructing such buildings and improvements as are herein contemplated, and that for such period as they may so hold possession of said premises prior to the beginning of the term of this lease they shall not be required by said party of the first part to pay any rent."

It is next provided that the lessees shall keep all buildings and improvements placed upon the premises insured in the name of the lessor, for their full insurable value, and in default thereof the lessor may insure the same for himself, charging the same to the lessees. Other provisions relate to paying water tax; keeping the premises in a clean and wholesome condition, in accordance with the ordinances of the city and the directions of its health officers; that premises shall not be underlet, etc.

The claim of the petitioner is for \$1111.47, with interest from November 25, 1896, amounting in all to \$1219.84, for lumber and materials furnished for the erection of the buildings. It is averred that on November 28, 1896, the petitioner filed with the clerk of the circuit court of Cook county a statement in writing setting forth the amount due, with a correct description of the property.

The answer of the defendants Jones and wife, as shown by the abstract, admits all the material allegations of the amended petition except the averment that after the forfeiture of the lease by Jones the premises were leased to other parties for an annual rental of \$1762.50, or any sum in excess of the rent reserved in the forfeited lease, and denies that petitioner is entitled to interest upon its claim, and denies generally that the petitioner is entitled to the relief prayed.

JAMES H. HOOPER, for appellant.

GREEN, HONORE & PETERS, for appellees.

Mr. JUSTICE WILKIN delivered the opinion of the court:

Section 1 of the Mechanic's Lien law of this State in force June 26, 1895, (Hurd's Stat. 1897, p. 1034,) provides: "That any person who shall by any contract with the owner of a lot or tract of land, or with one whom such owner has authorized or knowingly permitted to improve the same, furnish or specially manufacture and prepare materials, fixtures, apparatus or machinery for the purpose of, or in building, altering, repairing or ornamenting any house or other building, \* \* \* shall be known under this act as a contractor, and shall have a lien upon the whole of such tract of land or lot and upon the adjoining or adjacent lots of such owner constituting the same premises, \* \* \* for the amount due to him for such material, fixtures, apparatus, machinery, services or labor, and interest from the date the same is due."

The very gist of the petitioner's case, as made by the averment, is, that it contracted to furnish the materials for which it claims a lien with parties (Kane and Meyer) whom the owner (J. Russell Jones) had "authorized or knowingly permitted to improve" the premises. If that allegation is not either admitted, or proved by the petitioner, its case must fail; but if admitted by the answer or established by the evidence, then by the plain provisions of the statute its right to a lien is established to the whole of the premises, to the same extent as though the agreement under which the lumber was furnished had been made with the owner himself. Conceding there was upon the hearing an issue of fact as to whether there was such authority or permission, as counsel for appellees assume there was, and also conceding that without a bill of exceptions or certificate of evidence we are not to presume, in support of the decree, that evidence was heard outside of the contract of leasing between the lessor and lessees, and looking to that contract alone, the petition is, in our opinion, amply sustained.

We understand counsel for appellees to contend that by the terms of the lease Kane and Meyer became original contractors for the erection of the buildings and the improvements placed upon the lots, and that the lumber company was at most but a sub-contractor under them. Extended arguments are submitted on either side of these propositions, but we regard them of very easy solution. It cannot be seriously claimed that under the agreement the lessees contracted with Jones to furnish materials or perform any of the labor or services named in the foregoing section of the statute, by the doing of which they would, by that section, be known as "*a contractor*." The statute is, as its title indicates, for the security of mechanics and those who furnish material for buildings, etc., therein named. Agreements made under its provisions are known in the law as building contracts, sometimes termed "working contracts." The clause in the lease which obligates the lessees to erect improvements upon the leased premises is in no sense a building contract. That clause means no more than that by the terms of the lease the tenants are to cause to be made such improvements as the landlord shall approve of, not to exceed in value \$6000, that sum to be re-paid by the landlord, either in the use of the premises, or in money, if he should decide to cut short the term of five years, the improvements to be a part of the real estate and to belong to him.

A contractor has been defined to be "one who, as an independent business, undertakes to do specific jobs of work without submitting himself to control as to the petty details." (3 Am. & Eng. Ency. of Law, 822.) It would scarcely be contended that under the provisions of our statute there could be such a thing as a sub-contractor's lien unless there existed a lien in favor of an original contractor, and we assume that no one would contend that Kane and Meyer, under their contract with Jones, could have enforced a lien against the leased prop-



erty for any improvements placed upon it by them under this agreement. Similar contracts have been before the courts in proceedings to enforce mechanics' liens, and have, without exception, so far as we are advised, been held to amount to authority or consent from the owner to a vendee or lessee to make the improvements, and, in the absence of some stipulation in the agreement to the contrary, to give a lien upon the interest of the owner for materials furnished or labor performed under contracts with the vendee or lessee. In fact, it is impossible to see how it can reasonably be said that one who agrees with another that he shall place buildings or other improvements upon certain property does not thereby "authorize or knowingly permit" the other to improve that property.

The case of *Henderson v. Connelly*, 123 Ill. 98, was one in which the Hendersons sold to one Sharp certain premises, the former agreeing that when Sharp should have expended \$325 in the erection of a dwelling house on the premises they would advance him, as the progress of the building justified in their opinion, \$875 to aid in its completion. Sharp contracted with Connelly to do certain work upon the building, which he did. Sharp having failed to comply with his contract of purchase, the Hendersons took possession of the property and completed the house. Connelly sought to enforce a lien upon the premises for the labor performed by him, and the Hendersons resisted that claim. The decree was in favor of the petitioner, and directed the master to sell the property, and after paying the costs to pay, first, the amount due the petitioner, and the surplus to the Hendersons. On appeal the latter insisted the decree was erroneous in that it did not give them priority, at all events, for the contract price of the property, relying on *Hickox v. Greenwood*, 94 Ill. 266. Holding the position not well taken and the case relied on not in point, we said (p. 102): "Here it was understood in the contract of sale between

the vendors and purchaser that the latter should go on and build upon the premises, and for the purpose of a consummation of this understanding a clause was inserted in the contract of sale by which the vendors agreed to advance the purchaser \$875 to assist him in the erection of a building on the premises, as the building progressed. The only reasonable and fair construction to be placed on this clause of the contract is, that the purchaser was authorized and empowered by the vendors to enter into contracts with builders to furnish material and erect a building on the premises to which they held the legal title." The doctrine of this case is recognized as being applicable to cases of leasing as well as sales in *Williams v. Vanderbilt*, 145 Ill. 238, where we said: "Where a lessor agrees to pay to the lessee a gross sum toward the erection of a house on the demised premises, the estate of the lessor is bound by the mechanic's lien,"—citing *Leiby v. Wilson*, 40 Pa. St. 63, and *Boiler v. Aspen*, 99 id. 313.

In *Lumber Co. v. Nelson*, 71 Mo. App. 110, the case is stated and decided as follows: "One of the stipulations in the lease from Nelson was that the lessees should expend \$20,000 in making improvements upon the leased premises, according to plans and specifications which had been agreed to. These improvements were to become the property of the lessor at the termination of the lease. In this state of the evidence it may be truthfully said the improvements on the Nelson lot, and the material necessary to make them, were made and furnished by his consent and for his benefit. He not only consented to them, but contracted with his lessees for them. The improvements were made and the material furnished under a contract authorized by him, and he must be held to have subjected his title in his lot to the plaintiff's lien, if the lien is otherwise valid.—*O'Leary v. Roe*, 45 Mo. App. 567; *Hall v. Parker*, 94 Pa. St. 109; *Barclay v. Wainright*, 86 id. 191; *Burkett v. Harper*, 79 N. Y. 273; *Hill v. Gill*, 40 Minn. 441; *Henderson v. Connelly*, 123 Ill. 98." This we regard as

a clear statement of the law, even under statutes without the provision in our act of 1895, "or with one whom such owner has authorized or knowingly permitted to improve," etc., and fully sustained by the authorities cited and numerous other decisions. See *Schmalz v. Mead*, 125 N. Y. 188, and cases cited; *Miller v. Mead*, 127 id. 544; *Burkett v. Harper*, 79 id. 273; *McCue v. Whitwell*, 156 Mass. 205.

It is urged, however, that the authority given by this lease was, at most, but a limited or qualified authority, and therefore not within the meaning of the statute. This position is based upon that part of the lease which says that for the cost of any of the buildings or improvements which may be made by the parties of the second part they "shall permit no mechanics' liens to attach to said premises," etc. Counsel construes this language to mean that the tenants had only authority to make improvements by stipulating, in any contracts therefor, that no mechanics' liens should attach. But with this construction we cannot agree. The clause, taken as a whole, does contemplate that a contract may be made which would be binding between a mechanic or material-man and the owner authorizing a lien, but requires, as between himself and the lessees, that they shall not permit the lien to attach,—that is, that they shall pay off the liabilities and thereby prevent the enforcement of a lien. The latter part of the clause clearly shows that the owner anticipated that that part of the agreement might not be performed by them, and he therefore protected himself from loss by reserving the right to declare a forfeiture and take the property. It seems to us very clear that under the terms of this lease the rights of the petitioner must be held to be the same, in every respect, as though the contract for the building material had been made directly with appellee Jones. In this view the lien attaches to the whole of the property,—the owner's title. It is his contract,—not that of the lessees,—and he gets the full benefit of it.

Both by the terms of the contract and the statute the petitioner is entitled to interest on this claim from the time it became due.

In our opinion the decree of the circuit court is in conformity with the law and facts of the case. The Appellate Court erred in reversing the decree, and its judgment will accordingly be reversed and the decree of the circuit court will be affirmed. The cause will be remanded to the latter court, with directions to carry into effect its decree.

*Reversed and remanded.*

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PAUL F. KNEFEL

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

*Opinion filed October 19, 1900.*

1. AMENDMENTS—*power of court to amend criminal record after nolle prosequi.* A clerical error in the record of a criminal case, showing that the motion for a new trial was overruled when it was in fact allowed, may be amended at a subsequent term to speak the truth, where the accused, after a *nolle prosequi*, seeks to use such record in his favor upon second indictment for the same offense.

2. SAME—*court may consider clerk's minutes in matter of allowing an amendment of record.* Upon motion to amend the record of a criminal case at a subsequent term, the court may examine the minute book, journal and docket of the clerk and hear the evidence of witnesses explanatory of the method in which the same were kept and the record written up therefrom.

WRIT OF ERROR to the Criminal Court of Cook county; the Hon. FRANK BAKER, Judge, presiding.

At the March term, 1897, of the criminal court of Cook county, an indictment for larceny was returned by the grand jury of said county against plaintiff in error, said indictment being docketed as case No. 46,575. Plaintiff

187	212
197	18

187	212
208	1466
110a	1819

in error entered a plea of not guilty, and a trial was had thereon by a jury at the May term, 1897, of said court, the Hon. John Barton Payne, judge, presiding. The jury found the plaintiff in error guilty and fixed his punishment at imprisonment in the penitentiary. On May 22, 1897, the plaintiff in error entered a motion for a new trial, whereupon the following order was entered of record:

“*The People of the State of Illinois* }  
v.  
*Paul F. Knifel.* }

“This day came the People, by Charles S. Deneen, State’s attorney, and the said defendant, as well as in his own proper person as by his counsel, comes; and the court hearing counsel in support of said motion as well as in opposition thereto, and being now fully advised in the premises, doth overrule the said motion, and orders that said motion for a new trial be and the same is hereby overruled accordingly.”

On June 9, 1897, the plaintiff in error was released upon his own recognizance. Upon September 27, 1899, an order of *nolle prosequi* of said indictment was entered on the motion of the State’s attorney. The plaintiff in error was re-indicted by the grand jury of said county for the same offense, said indictment being docketed as case No. 47,485. On the 29th day of September, 1899, on the trial of said indictment in the criminal court of said county, the Hon. Frank Baker, judge, presiding, as a part of his defense plaintiff in error sought to introduce in evidence the record in case No. 46,575. Counsel for the People objected to the introduction thereof on the ground that the same did not speak the truth, and then and there moved the court that the record therein be amended so as to show that said motion for a new trial had been allowed. The court, from an inspection of the minute book, journal, docket and record in said case, and from the oral testimony of witnesses sworn and examined in open court as to the identity thereof and the manner in which the same were kept, allowed said motion and ordered that the record be amended so as to show that said motion

for a new trial had been allowed, which said order was as follows:

STATE OF ILLINOIS, }  
County of Cook. } ss.      "Friday, September 29, 1899.

"*The People of the State of Illinois v. Paul F. Knefel*.—General No. 46,575.

"This matter coming on further to be heard on the motion of State's attorney, C. S. Deneen, to amend the record herein, the defendant being present in court and appearing by Joseph B. David, his attorney, and it appearing to the court, on inspection of the clerk's minutes and the clerk's journal of the orders of this court, that on May 22, 1897, at the May term thereof, an order was entered herein sustaining the motion of the defendant for a new trial, and it further appearing that by clerical error said order was spread upon the records so as to read that said motion was overruled: Now it is hereby ordered that said record be amended *nunc pro tunc* as of May 22, 1897, so as to read that said motion for a new trial herein was sustained, and that said order read as follows:

"'46,575.—*The People of the State of Illinois v. Paul F. Knefel*.—This day comes the said People, by Charles S. Deneen, State's attorney, and the said defendant, as well in his own proper person as by his counsel, also comes; and the court hearing counsel in support of the motion as well as in opposition thereto, and being fully advised in the premises, doth sustain said motion, and orders that the said defendant do have a new trial in this cause.'"

DAVID, SMULSKI & MCGAFFEY, for plaintiff in error.

E. C. AKIN, Attorney General, (CHARLES S. DENEEN, State's Attorney, and A. C. BARNES, of counsel,) for the People.

MR. JUSTICE HAND delivered the opinion of the court:

This is a writ of error sued out of this court to the criminal court of Cook county, for the purpose of reviewing the action of that court in the case of *The People of the State of Illinois v. Paul F. Knefel*, No. 46,575, in entering an order in said cause on the 29th day of September, 1899, amending the record in said cause *nunc pro tunc* as of

May 22, 1897, so as to make the same show that the order entered in said cause on said last named day for a new trial was sustained and not overruled.

"The power of courts, whether of law or equity, to make entries of judgment or decrees *nunc pro tunc* in proper cases and in furtherance of the interests of justice, is one which has been recognized and exercised from ancient times and as a part of their common law jurisdiction. This power, therefore, does not depend upon statute—it is inherent. It rests partly upon the right and duty of the courts to do entire justice to every suitor, and partly upon their control over their own records and authority to make them speak the truth." 1 Black on Judgments, sec. 126.

The law is well settled that a court is powerless to amend its final judgment and thereby correct judicial errors after the term at which it was rendered. It may, however, thereafter, upon notice to parties in interest, by order entered *nunc pro tunc*, amend or correct such judgment, when, by reason of a clerical misprision, it does not speak the truth. Freeman on Judgments, chap. 4; *Church v. English*, 81 Ill. 442; *Becker v. Sauter*, 89 id. 596; *Tucker v. Hamilton*, 108 id. 464.

The plaintiff in error contends that under the law of this State no power exists in a criminal case to amend the record for a misprision of the clerk of the court except during the term of the court at which the same is made. We cannot accede to this proposition. In the case of *Kennedy v. People*, 44 Ill. 283, the clerk, in writing the record showing the return of the indictment into court, made a mistake in the title of the offense with which the defendant was charged. The court say: "If such a mistake was made the court below has the power to permit the record to be amended upon a proper application by the People." In *Phillips v. People*, 88 Ill. 160, the record showed a plea of not guilty, when, as a matter of fact, no such plea had been entered. A trial and conviction

upon such record were had and the judgment was set aside because of the want, as a matter of fact, of such plea. The court below, on motion of the State's attorney, at a subsequent term ordered the record amended by striking out the plea of not guilty. In *Gore v. People*, 162 Ill. 259, a similar motion was granted and an amendment *nunc pro tunc* allowed in the court below at a subsequent term after the return of the indictment and after the suggestion of a diminution of the record in this court. These cases clearly establish that a clerical error in the record may be corrected at a term subsequent to the term when the same is made, in a criminal case.

It is next insisted that even though the court has power to allow the record to be amended or corrected, such correction cannot be made after the term from the memoranda of the court's orders made in the clerk's minutes at the time. That such correction may be made after the expiration of the term already appears by the decisions heretofore referred to. The language used by the court in these cases seems sufficiently general to include memoranda of the transactions or minutes of the clerk made at the time, under the direction and in the presence of the court. In the case of *Gore v. People*, *supra*, the court say: "The record may also be amended whenever there is any memorandum or record by which to amend." In *May v. People*, 92 Ill. 343, this court, in approving of the amendment, quoted from 1 Bishop on Criminal Procedure, (sec. 1160,) which reads: "Neither, it has been held, can the clerk, at a subsequent term, make an entry of what truly transpired at the preceding term. But this refers to the power of the clerk proceeding of his own motion. The court may order *nunc pro tunc* entries, as they are called, made to supply some omission in the entry of what was done at the preceding term; yet this is a power the extent of which is limited and not easily defined. In general, mere clerical errors may be amended in this way." In *Church v. English*, 81 Ill. 442, the court said: "Whether



it is a misprision of the clerk or a malfeasance, the court has power at all times, upon notice given, to reform its records so as to make them speak the truth. \* \* \* No reason suggests itself why such amendments may not be made at any time, so long as anything definite and certain remains to amend by." It was therefore competent for the court to examine the minute book, journal and docket of the clerk of the criminal court, and hear the evidence of witnesses explanatory of the method in which the same were kept and the record written up therefrom, in passing upon the motion to correct the order of May 22, 1897.

It is next insisted by plaintiff in error that the court had no power to correct said record after a *nolle prosequi*. We do not see how such order in any way limited the power of the court to make its record speak the truth. The plaintiff in error sought to make use, in the case on trial, of the record of a prior proceeding in said court as evidence in his favor. It was then brought to the attention of the court that such record did not speak the truth by reason of the clerical error or misprision of the clerk. It was manifestly proper for the court to amend its record by correcting the clerical error or misprision of the clerk complained of, so as to state the proceedings had before that time in said cause truthfully, even though the case had been *nollied*. The plaintiff in error and his attorney were present in court at the time the motion was made and the amendment allowed, participated in the argument and cross-examined the witnesses produced on the hearing thereof, and plaintiff in error is bound by the action of the court thereon.

We find no substantial error in this record. The judgment of the criminal court of Cook county is therefore affirmed.

*Judgment affirmed.*

WILLIAM BOLDENWICK *et al.*

*v.*

DANIEL CAHILL.

*Opinion filed October 19, 1900.*

1. INSTRUCTIONS—*when instruction is not to be regarded as misleading.* An instruction is not to be regarded as misleading where the matters which it touches upon are fully and properly stated in another instruction of the series.

2. SAME—*instructions should be based upon facts shown by the evidence.* Instructions are properly refused when applicable to facts which there is no evidence in the record tending to prove.

*Kee v. Cahill*, 88 Ill. App. 561, affirmed.

APPEAL from the Branch Appellate Court for the First District—heard in that court on appeal from the Circuit Court of Cook county; the Hon. FRANK BAKER, Judge, presiding.

JESSE A. & HENRY R. BALDWIN, for appellants.

JAMES S. HARLAN, for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

This is an appeal by James W. Kee from the judgment of the Branch Appellate Court for the First District, affirming the judgment of the circuit court of Cook county, against James W. Kee and Joseph M. Omo, in favor of Daniel Cahill, for the sum of \$6909.73. James W. Kee died March 21, 1900, and his death having been suggested, William Boldenwick and Paul Brauer, administrators of the estate of James W. Kee, deceased, have been substituted as appellants.

The declaration contains several counts, alleging, in various ways, that the defendants, on the 30th day of April, 1892, purchased from James Cahill and Florian S. Young, partners, etc., a certain restaurant and leasehold interest at 35 Adams street, in the city of Chicago; that

at the time of such sale the firm of Cahill & Young were indebted to the plaintiff in the sum of \$5000 and interest, and that as a part of the consideration of such purchase the defendants agreed to pay the indebtedness of Cahill & Young to the plaintiff.

The judgment of the Branch Appellate Court has settled all controverted questions of fact adversely to the defendants.

The appellants complain of the giving of the following instruction, on the ground it assumes there was an indebtedness due to Daniel Cahill from the firm of Cahill & Young:

1. "The jury is instructed, as a matter of law, that a promise made upon a valuable consideration, from one person to another, to pay a sum of money to a third person, is valid and binding and can be enforced by said third person in his own name. In this case, if the jury believe, from the evidence, that the defendants, as charged in the declaration, purchased the leasehold and personal property in the restaurant from Cahill & Young, and as a part of the purchase price therefor agreed and undertook to pay the indebtedness due to Daniel Cahill from the firm of Cahill & Young, then the jury must find the issues for the plaintiff for the sum remaining unpaid or due at the time of making the said agreement, and the interest upon it at the rate of five per cent."

At the instance of the defendants the court gave the following instruction:

3. "The jury are instructed that if you find, from the evidence, that at the time of the execution and delivery of the papers offered in evidence, and called a bill of sale, it was the intention of the firm of Cahill & Young and of James W. Kee and Joseph M. Omo (the parties thereto) that such acts of execution and delivery were an absolute sale, *then, unless you further find, from the evidence, that at the said time the said firm of Cahill & Young were indebted to the plaintiff in the sum of \$5000 (or more),*

*and that the said indebtedness was represented by the notes offered in evidence therein, and that the defendants herein then and there agreed to pay the said indebtedness and notes as a part of the purchase price of said sale, then your verdict must be for the defendants."*

This instruction informed the jury, although they might believe there was an absolute sale from Cahill & Young to the defendants, they should find for the defendants, unless they should further find, from the evidence, that at the time of such sale Cahill & Young were indebted to the plaintiff. The defect in the first instruction, if any, was cured by this instruction. An instruction is not to be regarded as misleading where the matter upon which it touches is fully and properly stated in another instruction. *Chicago West Division Railway Co. v. Ingraham*, 131 Ill. 659; *Bay v. Williams*, 112 id. 91; *City of Lanark v. Dougherty*, 153 id. 163.

It is also insisted that the court erred in refusing to give the following instructions:

6. "The jury are instructed, in behalf of the defendant Omo, to disregard all the testimony offered regarding alleged admissions, promises or agreements, if any, made by the defendant Kee when the defendant Omo was not present.

7. "The jury are instructed to disregard all the testimony offered herein regarding or concerning any alleged admissions, promises or agreements, if any, by either of the defendants herein when the other defendant was not present, made prior to the time of the execution of the paper entitled 'bill of sale,' offered in evidence herein.

9. "The jury are instructed that if you believe, from the evidence, that at the time of the execution and delivery of the paper offered in evidence, and called a bill of sale, it was the intention of James Cahill, Florian S. Young, James W. Kee and Joseph Omo (the parties thereto) that such acts of execution and delivery were not an absolute sale, but were for the security and protection

of the parties only, then your verdict must be for the defendants."

The case was tried on the theory that the promise to pay the debt of the plaintiff was made by the defendants at the time of the sale to them by Cahill & Young on the 30th of April, 1892, at which time both of the defendants were present. We find in the record no admissions, promises or agreements to pay the plaintiff's debt, made by either of the defendants, other than those made at that time, and are of the opinion there was no evidence upon which to base said instructions 6 and 7, or either of them, and think they were properly refused.

Instruction 9 was offered on the theory that the evidence must show an absolute sale from Cahill & Young to the defendants before they would be liable to the plaintiff. Under the declaration, as amended, we are of the opinion if the evidence showed that the bill of sale offered in evidence was intended between the parties as a mortgage only, and in consideration of the giving of such bill of sale securing a debt of Cahill & Young to the defendants the defendants agreed to pay the debt of Cahill & Young to plaintiff, the plaintiff might recover. The court, therefore, did not err in declining to give such instruction.

The evidence is quite voluminous, and the exceptions to the rulings of the court thereon very numerous. A discussion of all the points raised by appellants would serve no useful purpose. We have examined this record with much care, and fail to find therein any reversible error by reason of the rulings of the court during the trial of the case or in admitting or refusing to admit evidence.

We are of the opinion the case was fairly and impartially tried and that substantial justice has been done. The judgment will therefore be affirmed.

*Judgment affirmed.*

GEORGE W. WILSON

v.

THE CARLINVILLE NATIONAL BANK.

*Opinion filed October 19, 1900.*

1. **BANKS**—*collecting bank is the agent of the payee, and not of the forwarding bank.* If the bank which receives a check upon another bank for collection, according to the general banking custom, uses due care and diligence in forwarding the check and in selecting the collecting bank, then the collecting bank is the agent of the payee, and the receiving bank is not liable to the payee for the negligence or default of such agent.

2. **SAME**—*when receiving bank is not, as a matter of law, negligent in selecting collecting bank.* The receiving bank is not, as a matter of law, negligent in committing the collection of a check upon the only bank in a town to its correspondent, because it knew, or had reason to know, that the correspondent bank would send the check to the bank upon which it was drawn, for payment.

*Wilson v. Carlinville Nat. Bank*, 87 Ill. App. 364, affirmed.

**APPEAL** from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Macoupin county; the Hon. O. P. THOMPSON, Judge, presiding.

**BELL & BURTON**, for appellant.

**RINAKEK & RINAKEK**, for appellee.

**MR. CHIEF JUSTICE BOGGS** delivered the opinion of the court:

The appellant, having procured a certificate of importance, has prosecuted this appeal from the judgment of the Appellate Court for the Third District affirming a judgment in the sum of \$300, entered against him by the circuit court of Macoupin county, in an action of assumpsit brought by the appellee bank. The cause was heard in said circuit court before the court without the intervention of a jury.

It is urged the court entertained and applied erroneous views of the law applicable to the facts of the case. The facts necessary to be known in order the correctness of the ruling of the court on the propositions of law may be determined, are in substance as follows: The appellee bank conducted a banking business in Carlinville, Illinois. On March 30, 1893, appellant, a farmer and stock dealer, who resided some seven miles from Carlinville, while in Gillespie, a village about nineteen miles from Carlinville, received a check drawn in his favor by one Clark, in the sum of \$300, on the Citizens' Bank of Gillespie. Appellant then and for some two years before had kept an account with the appellee bank, making deposits therein and drawing checks against the same. He had frequently deposited in the appellee bank checks payable by other banks located in other towns and cities, and had been permitted to treat the amount of such checks as credits of cash to his account, subject to be drawn against by him as though the deposit had been of cash. On June 1, 1893, he brought the aforesaid check on the Gillespie bank to Carlinville and endorsed and delivered it to the appellee bank. The amount thereof, without any deduction or charge, was credited to him as though it had been a deposit of cash, and the same was paid out (together with other funds to his credit) on checks subsequently drawn by him. On June 1,—the day of the receipt of the check,—the appellee bank sent it by mail for collection to the National Bank of Commerce, its correspondent in St. Louis. June 2 the National Bank of Commerce sent the check by mail for collection to the Globe National Bank of Chicago, its correspondent bank. June 3 the Chicago bank sent it directly to the Citizens' Bank of Gillespie, on which it was drawn. The Citizens' Bank received the check June 5, and on the 7th day of June returned as payment its draft drawn on the National Bank of the Republic in St. Louis, for the full amount thereof. The draft so drawn by the Gillespie

bank was presented to the National Bank of the Republic in St. Louis for payment June 9, but payment was refused, the Citizens' Bank having failed on June 8. The appellee bank brought the action to recover the said sum of \$300 paid by it on checks drawn by the appellant against the credit obtained by the deposit of the said check in his favor on the Gillespie Bank and which it had not been able to collect.

The trial court, in propositions of law presented in behalf of the appellee bank, held that if the bank did not purchase the check from appellant, but received it from him for collection by means of correspondent banks, in accordance with the general custom of banks, and that it used due care and diligence in forwarding the check for collection and exercised reasonable care and prudence in selecting the bank to which it forwarded the same, such bank so selected became the agent of the appellant, and that the appellee bank was not liable to the appellant for any neglect or default of the correspondent bank or the Chicago bank to whom the said correspondent bank sent the same for collection. This is the view taken by the courts of last resort in Connecticut, Iowa, Kansas, Maryland, Massachusetts, Mississippi, Wisconsin, Nebraska, North Carolina, Tennessee, Missouri, Louisiana and our own State. (3 Am. & Eng. Ency. of Law, —2d ed.—p. 812.) The correspondent or collecting bank is regarded as the agent of the receiving bank, and not of the check owner, by the courts of final resort in Michigan, Minnesota, Montana, New Jersey, New York, Ohio, and also by the courts of the United States. (3 Am. & Eng. Ency. of Law, —2d ed.—p. 810.) The arguments and reasons upon which these conflicting adjudications are grounded are familiar to the profession, and discussion of the question may well be regarded as exhausted by what has been so often said *pro et con* in judicial opinions and by law writers. This court, as early as 1861, in the case of *Etna Ins. Co. v. Alton City Bank*, 25 Ill. 243, adopted



the rule announced in the proposition held by the trial court; and in the later decisions of *Drovers' Nat. Bank v. Provision Co.* 117 Ill. 100, and *Waterloo Milling Co. v. Kuens-ter & Co.* 158 id. 259, re-affirm the doctrine of the earlier case. It must be assumed the parties hereto acted in view of the long established and well settled rule of law in this State.

Nor do we think the court erred in refusing to hold proposition No. 4 asked by appellant, as follows:

"The court holds that if the plaintiff, at the time of sending the check in question to its St. Louis correspondent, knew that such St. Louis bank would, by itself or by its agents of its selection, send such check for payment direct to the drawee bank, then, under the law, such St. Louis bank would not be a suitable agent to be entrusted with the collection of such paper, and if the loss here complained of resulted from such method of collecting, then the defendant would not be liable here."

The court held proposition No. 10, the substance of which was that it was negligence on the part of the Globe National Bank to send the check by mail for payment to the Gillespie bank, on which it was drawn. The argument of counsel is, that the principle announced in proposition No. 10 being correct, it follows, logically and irresistibly, that if the appellee bank knew the National Bank of Commerce of St. Louis would, by itself or through its correspondent bank, send the check to the Citizens' Bank at Gillespie for collection, then that said appellee bank could not be regarded as having acted with reasonable diligence and care in selecting the National Bank of Commerce to make the collection, and that the trial court should have declared, as matter of law, that the appellee bank was careless and negligent in the selection of the National Bank of Commerce as an agent in the matter of the collection of the check.

The evidence sufficiently tended to show, and the court recited in proposition No. 5 held for the appellee,

"that it is a well known, long established and general custom of collecting banks to transmit directly to their correspondent out-of-town banks, for collection, checks drawn upon such out-of-town banks and in their hands for collection, in cases where there is no other bank in such towns." It also appeared from the testimony, and was recited by the court in proposition No. 1 in the same behalf, that the Citizens' Bank of Gillespie was the only bank in Gillespie. The evidence further sufficiently established that appellant knew there was but one bank in Gillespie, namely, the Citizens' Bank, upon which the check he held was drawn. It was also shown by the proofs, the appellant had, on prior occasions, deposited with the appellee bank other checks upon out-of-town banks, and availed himself of the facilities offered by the system adopted and in vogue only among banks and bankers for the collection of that class of paper. He may not have known the details of the system or custom in force among banks for the collection of such checks, but he knew the collection was to be made, without expense to him, through banks co-operating together, in compliance with certain usages and customs existing between such institutions to enable such collections to be so made. He knew there was but one bank in Gillespie, and that the one on which the check was drawn. The co-operation of that bank was essential to the operation of the mode of collecting the check, for there was no other bank at Gillespie to act in the matter. With this knowledge the appellant accepted the benefit of the facilities for the collection of his check which the banks held out to their customers. The usages and customs thus availed of by appellant contemplated the sending of the check directly to the bank upon which it was drawn, there being no other bank at that point. The appellant having knowledge there was but one bank at Gillespie, and that his check was to be collected, without cost or expense to him, through the medium of busi-

ness usages and customs in force only between banks and bankers, could not be permitted to accept the facilities thus afforded by the appellee bank for his accommodation, and afterwards insist compliance by the appellee bank with the usages and customs, the benefit whereof he sought to avail himself of, should constitute actionable negligence.

The trial court did not err in refusing to declare, as matter of law, the appellee bank was negligent in committing the collection of the check to the National Bank of Commerce, though it knew, or had sufficient reason to be chargeable with knowledge or notice, that said National Bank of Commerce would directly or indirectly send the check to the bank on which it was drawn for payment.

The other questions argued by counsel are questions of fact or mixed questions of law and fact, and not open to review in this court.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

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THE COMMERCIAL NATIONAL BANK OF PEORIA

v.

JOHN WAGGEMAN *et al.*

*Opinion filed October 19, 1900.*

APPEALS AND ERRORS—when Appellate Court's judgment must be affirmed. The judgment of the Appellate Court must be affirmed, on appeal, in a chancery case, where no question of law is presented and the preponderance of the evidence in the record sustains the conclusions of the master, the chancellor and the Appellate Court.

*Commercial Nat. Bank v. Waggeman*, 87 Ill. App. 171, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Peoria county; the Hon. T. M. SHAW, Judge, presiding.

JACK & TICHENOR, for appellant.

STEVENS & HORTON, for appellees.

Mr. JUSTICE CARTER delivered the opinion of the court:

The appellant bank brought its bill in the Peoria circuit court against the appellees to foreclose a mortgage given by appellees John and Sophronia Waggeman to appellee Wilhelmina Harre, to secure their note to her of \$3500. The bank claimed that the note and mortgage had been duly pledged to it to secure three notes of one Potthoff, aggregating the same amount, given by Potthoff for borrowed money. The appellees answered that the purported assignment of the Waggeman note by Mrs. Harre was a forgery, and that said note was so pledged by Potthoff without right and without authority from her. She also filed her cross-bill to compel the bank to surrender and deliver the note to her. The master reported the evidence to the court, with his conclusions that the purported signature of Mrs. Harre on the back of the note was a forgery and that the pledge was made by Potthoff without her knowledge or consent, and recommended a decree in her favor. The court overruled the exceptions of appellant and rendered a decree dismissing the bill and ordering that the note and mortgage be surrendered to Mrs. Harre, as prayed in her cross-bill. The Appellate Court has affirmed the decree.

Potthoff was the son-in-law of Mrs. Harre, and had obtained possession of the note to collect the interest for her. No question of law is involved, and the preponderance of the evidence in the record sustains the conclusions reached by the master, the chancellor and the Appellate Court. The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

SILVERT HOLLESEN *et al.*

v.

THE CITY OF CHICAGO.\*

*Opinion filed October 19, 1900.*

This case is controlled by the decision in *Kuester v. City of Chicago*, (*ante*, p. 21.)

WRIT OF ERROR to the County Court of Cook county;  
the Hon. C. F. WHEAT, Judge, presiding.

HUFF & COOK, for plaintiffs in error.

CHARLES M. WALKER, Corporation Counsel, ARMAND F. TEEFY, and WILLIAM M. PINDELL, for defendant in error.

Per CURIAM: The above case, and the three decided with it, are writs of error to reverse judgments of confirmation of special assessments levied under ordinances of the defendant city, providing for the improvement of certain of the streets of the city. The objection to the sufficiency of the ordinances is the same in each cause, viz., that the size or quality of the flat stones on which the curb-stones are to be bedded is not specified, being the precise objection sustained by this court in *Lusk v. City of Chicago*, 176 Ill. 207. The argument and suggestion in behalf of the city are the same as those considered and disposed of in the opinion in the case of *Kuester v. City of Chicago*, (*ante*, p. 21.)

The judgment in each of the said cases is reversed, and the causes are respectively remanded for such other and further proceedings as to law and justice shall appertain.

*Reversed and remanded.*

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\*With this case are decided No. 897, *Decker v. City of Chicago*; No. 942, *Cruickshank v. Same*; and No. 957, *Arias v. Same*.

H. C. MIDDAUGH *et al.*

*v.*

THE CITY OF CHICAGO.

*Opinion filed October 19, 1900.*

1. PUBLIC IMPROVEMENTS—*when an ordinance must be regarded as originating with board.* If the council in a city of over 50,000 inhabitants has failed for a year to act upon an ordinance submitted by the improvement board in accordance with a property owners' petition, the action of the board in passing a resolution changing the scheme of the improvement and recommending a new ordinance, after public hearing pursuant to notice, is an abandonment of the first scheme; and the later ordinance must be regarded as originating with the improvement board, although it acted on the suggestion of a member of the council in making the change.

2. SPECIAL ASSESSMENTS—*when ordinance is not void for assessing whole cost to private property.* A paving ordinance providing that the whole cost shall be paid by special assessment, "in accordance with" the Improvement act of 1897, is not void on the ground that there was no previous ascertainment of benefits, since, under the act of 1897, the property owner may object to the commissioners' apportionment of public and private cost and have the same reviewed by the trial court, notwithstanding the ordinance.

APPEAL from the County Court of Cook county; the Hon. O. H. GILMORE, Judge, presiding.

FLOWER, SMITH & MUSGRAVE, MARK BREEDEN, Jr., GEORGE R. BROWN, and ARTHUR B. WELLS, for appellants:

Where the board of local improvements fails to act on its own judgment, and permits the character of the improvement to be arbitrarily dictated by the city council or by aldermen, the assessment is illegal. Laws of 1897, p. 82.

The board of local improvements has no power, after a hearing on a resolution for an improvement, to abandon the same and institute a different improvement, unless the objections shall have been made to the improvement first proposed at the public hearing. Laws of 1897, p. 83.

An ordinance which provides that a local improvement shall be wholly paid for by special assessment upon the property benefited, without reference to whether the property is benefited to that amount, is void. *St. John v. East St. Louis*, 50 Ill. 92; *Greeley v. People*, 60 id. 19; *Watson v. Chicago*, 115 id. 78; *Crawford v. People*, 82 id. 557; *Newman v. Chicago*, 153 id. 469.

CHARLES M. WALKER, Corporation Counsel, and ARMAND F. TEEFY, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

This is an appeal by certain property owners from a judgment of confirmation of a special assessment levied to pay the cost of grading, curbing, and paving with granite blocks, a designated part of Clinton street, in Chicago.

The first objection urged here is, that the ordinance did not originate with the board of local improvements. The record shows that a petition by the property owners owning the greater proportion of the property abutting upon the proposed improvement was presented to the board of local improvements early in 1898, asking that the street be paved with cedar blocks. Afterward, on April 20, 1898, the board passed a resolution to comply with the petition, and a public hearing was had before the board early in May following, and a resolution was then passed adhering to the former resolution. An ordinance was prepared by the board and submitted to the city council with its recommendation and the estimate of the cost of the improvement, as required by the act concerning local improvements in force July 1, 1897. (Laws of 1897, p. 101.) It does not appear from the record that this ordinance was passed by the city council, but evidence was given on the hearing of the objections tending to prove that at the instance or upon the advice of the council or of an alderman of the ward, the board

afterward, in May, 1899, passed a resolution to pave the street with granite blocks, and after a public hearing, pursuant to proper notice, adhered to such last named resolution, and prepared and submitted to the council another ordinance with its recommendation and estimate of the cost, in accordance with the statute, as a new scheme and without any reference to the former one. The city council passed this ordinance, under which the petition was filed in the county court and the proceedings involved in this case were taken.

Appellants insist that while the board had the power, under section 7 of the statute, to originate a scheme for a local improvement in cities of this class without a petition, yet, it having already acted upon a petition of the property owners and decided upon and recommended the paving of the street with cedar blocks and prepared and submitted to the council an ordinance therefor with proper estimates, its power was exhausted and it could not then originate a different improvement. So far as the record shows, the board did all that was required of it by the statute in relation to the first scheme. It had no power over the ordinance after it was submitted to the council, and if that body failed or refused to adopt it, and no further steps were taken, the effect was an abandonment of the improvement which it had proposed. The board had the undoubted power to originate a scheme of improvement of the street, and, under the circumstances shown in this case, its act in doing so a year after the first ordinance was submitted to the council was an abandonment of the first scheme. Appellants and all others interested had an opportunity to be heard at the public hearing held to consider the proposed change in the character of the improvement. It is not, of course, meant to be said that the city council, or any member of it, has any power, under the statute, to direct the board as to the kind or character of local improvements which it will recommend; but we cannot hold, under the evidence in



this case, that the proposed improvement, and the ordinance therefor, did not originate with the board of local improvements, as contended by appellants.

The next objection urged is, that the ordinance is void because it provided the whole cost of the improvement and of levying and collecting the assessment shall be paid for by special assessment. The whole provision of the ordinance on that question is contained in the following:

"Sec. 3. That said improvement shall be made and the whole cost thereof, including the sum of \$2377.35 costs, (being the amount included in the estimate of the said engineer, hereto attached, as the cost of making and collecting the assessment herein,) be paid for by special assessment, in accordance with an act of the General Assembly of the State of Illinois entitled 'An act concerning local improvements,' approved June 14, A. D. 1897, and that said sum of \$2377.35 costs shall be applied toward the costs of making and collecting such assessment."

The objection is, that the whole cost is by the ordinance imposed upon private property without regard to benefits and without any prior ascertainment by the council that there was property which was specially benefited to an amount equal to the cost of the improvement, and counsel refer to the following cases to sustain their objection: *St. John v. City of East St. Louis*, 50 Ill. 92; *Greeley v. People*, 60 id. 19; *Crawford v. People*, 82 id. 557; *Newman v. City of Chicago*, 153 id. 469; *Watson v. City of Chicago*, 115 id. 78.

We have no doubt that the ordinance would be subject to the same infirmities held fatal in two or more of the cases cited, had the provision in question in section 3 ended at the words "special assessment." But it must be observed that the ordinance provides that the improvement shall be made and the cost thereof paid for by special assessment, "in accordance with" the act (describing it) of 1897. In *Newman v. People*, 153 Ill. 469, we held that

the statute, as it then was, authorized a local improvement to be made by special assessment alone, but that the assessment could not exceed the benefits, and that if the special benefits be less than the cost of the improvement the excess of such cost must be assessed against the city or village. We there held, in considering the statute under which that case arose, that the power to make the improvement by special assessment alone necessarily involves and includes the power, through the commissioners, to apportion a part of the cost, of benefit to the public, to the city or village. The ordinance in that case, as in this, referred in specific terms to the statute and provided that the assessment should be made in accordance with its provisions, and we held that by necessary implication the excess of the cost over the special benefits was to be paid by general taxation, for the reason that whatever part of it is apportioned to the city can be paid in no other way.

An examination of the act of 1897 will show that it makes specific provision for the levying of special assessments according to special benefits, and for the apportionment, in just and equitable proportions, between the city and the property benefited as well as between the pieces of property benefited. There would therefore seem to be no necessity for incorporating these provisions in the ordinance, where the ordinance provides that the improvement and the assessment shall be made in accordance with the provisions of the statute. It does not follow that the whole cost shall be assessed upon the property specially benefited because the ordinance so provides. The superintendent of assessments, or person directed by the court to apportion the assessment between the city and the property benefited and to make the assessment, must obey the statute and the order of the court in this regard, notwithstanding there may be an apparent conflict between it and the ordinance, and as the statute now is, it is the duty of the court to see to

it that he does so, and, if necessary, to revise or change the apportionment made by him between the public and the property benefited, so as to make it a just and equitable distribution of the cost of the improvement. Section 1 of the statute confers on the corporate authorities of those municipal bodies the power to make such local improvements as are authorized by law, by special assessment, or by special taxation of contiguous property, or by general taxation, or otherwise, as they shall by ordinance prescribe; and section 8 expressly requires that the ordinance shall provide whether the improvement "shall be made wholly or in part by special assessment, or special taxation of contiguous property, and if in part only, shall so state." It is difficult, in the face of these provisions, to see why an ordinance should be declared void because it provides that the whole cost shall be paid by special assessment.

The courts cannot say, as matter of law, that all local improvements are of benefit to the public, in the sense intended by the statute, so as to require a part of the cost of the improvement to be paid by the municipality. But such municipality has the power, under the statute, to provide in any case that a part of the cost shall be paid by general taxation. Therefore, when it provides that the whole cost shall be paid by special assessment the legal intendment is only that it does not elect to pay any part of the cost, but it will nevertheless be required to pay whatever proportion may be apportioned to it by the officer making the assessment, or by the court upon revising and confirming it, unless the proceedings be discontinued. When all of the provisions of the statute are considered no serious difficulty in complying with its provisions is seen. Before the statute of 1897 the courts were powerless to review the apportionment of the assessment made by the city council or the commissioners between the municipality and the property assessed, and so long as the property was not assessed more than it

was specially benefited or more than its just proportion of the cost of the improvement, the owner could not be heard by the court on his objection that the distribution of the whole cost as between the public and the property assessed was unjust and inequitable and should be changed. But now he has the right to be heard on that question, and the municipality no longer has the power, in cases of special assessments, to determine finally for itself that the public will not be benefited by the improvement but that the whole cost shall be borne by the property owners to the extent that it can be proved their property will be specially benefited. We have held in many cases that the rule applicable to special taxation is not applicable to special assessments. In the case at bar the whole cost was assessed upon the property benefited, and the superintendent of assessments estimated and reported that he had apportioned to the city as public benefits "no dollars" and to the property benefited \$42,000, which was the whole amount of the cost. Counsel say that in so doing the superintendent followed the ordinance, and that the property owner has no more protection against unfair and burdensome assessments than he had before the act of 1897 was passed. It is sufficient to say that appellants did not ask the court to revise or change this apportionment, or cause the same to be revised or changed. If the officer does not obey the statute and the order of the court and observe his oath in this respect, the property owner may call upon the court and thus compel obedience to the law. Had they done so in this case the court would have had full power to make, or cause to be made, a just and equitable apportionment of the burden of the improvement between the city and the property owners, and we must assume it would have exercised such power.

What has been said, and a consideration of the changes in the statutes since certain of the decisions cited were rendered, will dispose also of the point made that the

ordinance was void because there had been, when it was adopted, no ascertainment that there was property which would be specially benefited to an amount equal to the whole cost of the improvement.

Other objections are urged, but we think the court did not err in overruling them. They require no further mention.

The judgment will be affirmed.

*Judgment affirmed.*

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GOMER E. HIGHLEY

v.

SOPHIA G. METZGER, EXRX.

*Opinion filed October 19, 1900.*

1. APPEALS AND ERRORS—*when expression of opinion by the court will not reverse.* A remark by the court which might be construed as an expression of opinion as to the force or effect of evidence is not ground for reversal, if it is apparent from the evidence that with or without the remark the verdict of the jury could not have been otherwise than it was.

2. SAME—*Statute of Frauds cannot be first availed of on appeal.* The defense of the Statute of Frauds cannot be considered on appeal when not pleaded in the court below or raised by objecting to the evidence or taking exception to the instructions, or otherwise.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. JOHN C. GARVER, Judge, presiding.

This is an action in assumpsit, brought on August 8, 1898, by appellee, as executrix of the will of William G. Metzger, deceased, against appellant to recover a debt of \$10,000.00 and interest, which had become due from appellant to the deceased in the lifetime of the latter. The declaration consisted of the common counts. The pleas were non-assumpsit and set-off, but the latter plea,

after replication had been filed thereto, was withdrawn. The jury rendered a verdict for appellee, the plaintiff below, in the sum of \$10,800.00, and, after a motion for a new trial had been overruled, judgment was rendered upon the verdict. An appeal was taken from this judgment to the Appellate Court where the judgment has been affirmed. The present appeal is from the judgment of affirmance so entered by the Appellate Court.

The deceased, William G. Metzger, who died testate on June 8, 1898, was, for a number of years before his death, the secretary or secretary and treasurer of the Metzger Linseed Oil Company of Chicago. The appellant, Highley, was also connected with the same company during the same time. After Metzger's death Highley was elected secretary of the Metzger Linseed Oil Company. The property and business of that company were, on January 1, 1899, sold to the American Linseed Oil Company, and appellant, Highley, was elected secretary of the last named company; but the accounts of the Metzger Linseed Oil Company were not sold to the American Linseed Oil Company, the Metzger company remaining the owner thereof. One Simpson, a former book-keeper of the Metzger company, retained possession of the books, check-stubs, receipts, bills, checks and everything belonging to the Metzger company, and was collecting the accounts of that company. At the time of the trial Simpson was acting as auditor for the American company. On April 8, 1897, Metzger, as secretary and treasurer of the Metzger company, drew a check for \$10,000.00 in favor of appellant, Highley, and delivered it to him. At that time Metzger had a credit on the books of the Metzger company for more than that sum, and the sum so drawn was charged to Metzger's private account. Metzger paid the amount of the check to the oil company. The amount of this check was never re-paid to Metzger by appellant in his lifetime, and is the amount of money for the recovery of which the present suit has been brought.

More than four days before the trial below, appellant was served with a *subpœna duces tecum* to produce on the trial the check for \$10,000.00, the books of the Metzger oil company, in use in April, 1897, the stub check-book showing the stub of the check, and the cash book and general ledger. It was proven that, when the subpœna was served upon appellant, he admitted that he had the custody of these books and papers, and promised that he would produce them, stating that Simpson had the key to the vault containing the books, but that he, appellant, could get them without Simpson. The books, checks, stub-book, etc., were not produced by the appellant, and, upon the trial, the court permitted the introduction of secondary evidence of the contents of the books and check. A sworn copy of the personal account of William G. Metzger with the Metzger Linseed Oil Company was put in evidence showing a charge against him on April 8, 1897, of \$10,000.00.

WILLIAM W. GURLEY, and HORACE G. STONE, for appellant.

LOESCH BROS. & HOWELL, for appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The questions involved in this case are almost entirely questions of fact. They are settled by the judgments of the circuit and Appellate Courts. The judgment of the Appellate Court, affirming, as it does, the judgment of the circuit court, is a final adjudication, so far as we are concerned, upon these questions of fact. No error is assigned by appellant as having been committed by the trial court in the giving or refusal of instructions. Only two points are presented in the argument of counsel for appellant, which are proper for our consideration; and these relate to the rulings or remarks of the trial court in regard to certain portions of the evidence.

It was not denied on the part of appellant upon the trial below, that the check for \$10,000.00 was delivered by the deceased to the appellant, and that appellant obtained the money upon that check from the bank upon which it was drawn. It is claimed, however, upon the part of the appellant, that the money represented by the check was paid to him on account of the purchase by the deceased of certain stock in the C. L. Pullman Center Vestibule Car Company. There seems to be some confusion and inconsistency in the claim of the appellant in reference to this stock, it having been insisted upon the trial below that he sold the stock to the deceased and received the \$10,000.00 in payment for it, and it being insisted in the argument now addressed to this court that appellant used the \$10,000.00 in the purchase of the stock as agent for the deceased Metzger.

The first objection, made by appellant's counsel, is that, when he was cross-examining one of the witnesses of the appellee upon the question whether or not the deceased Metzger owned the stock in question, the trial court made a remark, embodying an opinion of the court itself as to the force and effect of the evidence upon this subject. Complaint is made, that the action of the court in this regard tended to prejudice the minds of the jury against the appellant, so far as this part of the testimony was concerned.

Appellant's counsel had called out from the witness, upon the cross-examination, five statements to the effect that the deceased never owned or had any interest in the stock in question. Objection was made by counsel for appellee, that the witness had already made answer to the questions propounded to her upon this subject, and that further questions were unnecessary as being a mere repetition of what had already been said. The remarks of the court were not intended to express any opinion upon the bearing or force of the evidence of the witness, and had no further or other meaning than that



the answers already given were sufficient, and that, therefore, further answers to the same questions were unnecessary. (*Chicago City Railway Co. v. McLaughlin*, 146 Ill. 353).

If, however, the language of the court is capable of the construction claimed for it by counsel for appellant, it is not necessary to reverse this case for the error committed by the court in making the remark complained of, because it is apparent that appellant suffered no injury from the remark.

In *Chicago and Eastern Railroad Co. v. Holland*, 122 Ill. 461, we held that, where a remark of the character, which is here complained of, was made by the court, it would not be ground of reversal, if the reviewing court could see that the party complaining suffered no injury because of it. It will be manifest to the court, that no injury has been suffered by the complaining party in such a case, when, either with or without the making of the remark complained of, the verdict of the jury could not have been otherwise than it was; and, had it been otherwise, would have been set aside by the court. (*Gray v. Merriam*, 148 Ill. 179, and cases there cited).

The fact, that the money paid by deceased to appellant, was not so paid for the purpose of procuring the stock in question, or for the purchase of such stock, was established by an overwhelming preponderance of the evidence. Three witnesses upon the trial swore that, after the death of the deceased, the appellant admitted that he owed the \$10,000.00 to the deceased, and acknowledged his indebtedness in that amount to the deceased, and promised to pay the same to his executrix. If the appellant was thus individually indebted to the estate of the deceased for the \$10,000.00, he did not receive it as a payment for the sale of stock to the deceased. In addition to this, appellant's counsel, by cross-examining one of appellee's witnesses upon a subject which was not proper cross-examination, established the fact, that the deceased never had any interest in this stock. Appellant

himself did not testify, that the money was advanced to him by the deceased for the purpose of investing it in the stock of the Pullman Car Company. Moreover, the original certificates of stock issued by the Pullman company were introduced in evidence. They were issued to the appellant, and not to the appellee. It is true, that there were assignments of the certificates of stock endorsed thereon, purporting to transfer the same to the deceased, but these assignments were signed by the appellant. There were no endorsements of any kind upon the certificates of stock, or upon the books of the Pullman company by the deceased. And yet it appears, that these certificates of stock were taken up and surrendered, and that the Pullman Car Company was re-organized, and new certificates were issued in the place of the certificates thus surrendered. The proof shows, that these new certificates were issued, not to the deceased, or his representatives, but to the appellant,\*and that they were in the possession of appellant at the time of the trial. This would not have been the case, if the deceased, instead of the appellant, had been the owner of the stock. It thus appearing by the overwhelming weight of the evidence, that the deceased had no interest in this Pullman stock during his lifetime, the verdict of the jury could not have been otherwise than it was under the legitimate evidence introduced in the case, even if the remark of the court is to be regarded as improper. Therefore, the appellant suffered no injury.

Counsel for appellee asked the appellant during his cross-examination, whether he received the money upon the check which was given to him by the deceased, and he answered that he did receive it. Counsel for appellant upon the re-direct examination then asked the witness what he did with the money thus received. Counsel for appellee objected to this question, and the objection was sustained. The ruling of the court in sustaining the objection thus made is assigned as error. We are of the

opinion, that the court committed no error in this regard, because it was immaterial what the appellant did with the money of the deceased after he received it. The question was whether he received it or not. If, as is claimed by the appellee, it was a loan by the deceased to Highley, the question, what Highley did with the money after the loan was made to him, was altogether immaterial. So, also, if the contention of the appellant is correct, that Highley received the money in payment for stock sold to the deceased, it would be immaterial what he did with the money received upon the sale of such stock.

Appellant makes several other points which cannot be considered, because they do not appear to be properly raised upon the record. For example, it is urged that, if appellant agreed to pay \$10,000.00 to the executrix of Metzger's estate, he thereby agreed to discharge an obligation, which was due to the estate from the Pullman Car Company; and it is said that, inasmuch as the promise thus made was a promise to pay the debt of a third person, it should have been in writing, and, not having been in writing, is void under the Statute of Frauds. We find no evidence whatever in the record sustaining the position, that any promise was made by appellant to pay a debt due to the estate from the car company. But, if there was such evidence, it is well settled in this State, that a party, who would avail himself of the Statute of Frauds as a defense, must plead it. (*Sanford v. Davis*, 181 Ill. 570; *Beard v. Converse*, 84 id. 512). Here, there was not only no plea setting up the Statute of Frauds, but no objection was made to the evidence, nor any exception taken to the instructions, by which the question could be raised in the court below. It cannot be raised for the first time here.

For the reasons above stated the judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

## FRANK STEINER

v.

## THE PEOPLE OF THE STATE OF ILLINOIS.

*Opinion filed October 19, 1900.*

1. CRIMINAL LAW—*effect of omission of words "beyond a reasonable doubt" from instruction.* Giving an instruction omitting the words "beyond a reasonable doubt" after the words "though the jury may believe, from the evidence," is not error, where the omitted words are properly used in other instructions and the jury are informed in several instructions what constitutes a reasonable doubt.

2. SAME—*the right of self-defense exists if danger to life is reasonably apparent.* An instruction given for the People in a murder trial is erroneous which limits the accused's right of self-defense to actual danger, and leaves the jury to infer that there could be no justification for the act of killing if the danger was only apparent.

3. SAME—*jury should be left free to convict of manslaughter or murder.* Since one indicted for murder may be found guilty of manslaughter, it is error to instruct the jury that if they believe the facts stated in the instruction to be proved, then the accused "is guilty of murder and the jury should so find."

WRIT OF ERROR to the Criminal Court of Cook county;  
the Hon. FRANK BAKER, Judge, presiding.

This is an indictment against the plaintiff in error, Frank Steiner, and one Louisa Karus, otherwise called Louisa Schrader, charging them with the murder of Joseph Karus by stabbing with a knife on July 11, 1899. The defendants pleaded not guilty. The jury returned a verdict finding the plaintiff in error, Frank Steiner, guilty of murder in manner and form as charged in the indictment, and fixing his punishment at death. By their verdict the jury found Louisa Karus not guilty. Plaintiff in error filed a motion for a new trial, which was overruled. Exception was taken to the order overruling the motion for new trial. A motion in arrest of judgment was made and overruled, and exception was taken to the order overruling the same. Judgment was rendered against the plaintiff in error in accordance with the verdict, and

sentence of death was pronounced against him. At the April term of this court a writ of error was granted, and made a *supersedeas*.

JULIUS GOLDZIER, and FRANK JOHNSTON, Jr., for plaintiff in error.

E. C. AKIN, Attorney General, (CHARLES S. DENEEN, State's Attorney, and HAYNIE R. PEARSON, of counsel,) for the People.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The eighth instruction, given by the trial court for the People, is as follows:

"Even though the jury may believe from the evidence that there was a struggle between the defendant, Frank Steiner, and the deceased, Joseph Karus, and in such struggle the said defendant, Frank Steiner, inflicted a mortal wound upon said Joseph Karus in manner and form as charged in the indictment, from which he died, but that said wound or wounds causing the death of said Joseph Karus were not inflicted by the said Frank Steiner to save his own life or save himself from great bodily harm, and were not inflicted by the said Frank Steiner upon a sudden heat of passion, caused by provocation apparently sufficient to make the passion irresistible, then the said defendant, Frank Steiner, is guilty of murder, and the jury should so find."

The instruction above quoted is claimed by the plaintiff in error to be erroneous for three reasons. First, the instruction is objected to upon the ground that it omits the words, "reasonable doubt." Undoubtedly the law is in criminal cases, that the jury must believe the defendant to be guilty beyond a reasonable doubt before they can convict. But the omission of the words, "beyond a reasonable doubt," after the words, "even though the jury

may believe from the evidence," in the above instruction, does not make it erroneous, because the omitted words were used in several other instructions which were given to the jury; and the jury were informed in several instructions what constituted a reasonable doubt. The doctrine, laid down by this court in the case of *Peri v. People*, 65 Ill. 17, is precisely applicable to the instruction now under consideration. In the *Peri* case we said (p. 24): "It is urged that the first of the People's instructions was wrong, because it fails to inform the jury that they must believe the facts supposed in the instruction to be true beyond a reasonable doubt before they could find the accused guilty. \* \* \* On a careful examination of the instructions, we find that, by the fifth of defendant's instructions, the jury are told that, unless they believe beyond a reasonable doubt that the defendant is guilty, they should acquit; and they are so informed in his sixth, and what constitutes a reasonable doubt is explained in the seventh. These instructions were all given, and we cannot, after so plain a direction on the part of the court, believe that the jury disregarded them. In the case of *Kennedy v. People*, 40 Ill. 488, it was held that, if the jury were properly instructed as to a reasonable doubt in a portion of the People's instructions, it was not error to omit that expression in others given for the prosecution."

The second objection, made to the eighth instruction, is that it ignores the doctrine of apparent danger. In this respect the instruction is unquestionably erroneous. It limits the right of self-defense to actual danger, and leaves the jury to reasonably infer, that there could be no justification for the act of killing, unless the necessity to destroy life in self-defense was actual and not apparent, "although regarded sufficient by all reasonable understandings." (*Schnier v. People*, 23 Ill. 17). It has been held by this court in a number of cases, "that the necessity for taking the life of the deceased need not be real and absolute, but if the necessity is so apparent as to

induce the belief in a reasonable mind, that the danger was so imminent that no other means of escape existed but to take the life of the deceased in order to preserve that of the accused, that such apparent danger will justify the homicide." (*Schnier v. People, supra*). If the defendant is assaulted by the deceased in such a manner, as to induce in him a reasonable and well-grounded belief, that he is in actual danger of losing his life, or suffering great bodily harm, when acting under such reasonable belief he is justified in defending himself, whether the danger is real or only apparent. (*Campbell v. People*, 16 Ill. 17; *Maher v. People*, 24 id. 241; *Roach v. People*, 77 id. 25; *Steinmeyer v. People*, 95 id. 383; *Davison v. People*, 90 id. 221; *Panton v. People*, 114 id. 505; *Enright v. People*, 155 id. 32). In *Maher v. People, supra*, we said: "This court, in the case of *Campbell v. People*, 16 Ill. 17, held that a person, when threatened with danger, must determine from the appearances and the surrounding circumstances as to the necessity of resorting to self-defense; and that, if the danger was apparently so imminent, and pressing, that a reasonable and prudent man would suppose, that it was necessary to take the life of his assailant, to preserve his own, or to avoid the infliction of a grievous bodily injury, then the killing would be justifiable." The eighth instruction undoubtedly conveys to the minds of the jury the idea, that the plaintiff in error could not sustain his alleged justification of self-defense, unless his danger was not only apparent and imminent, but was actual and positive. Such an instruction has been so often condemned by the decisions of this court—as may be seen by a reference to the cases above referred to—that its erroneous character cannot be ignored.

The third objection is to the form of the conclusion of the instruction. After pre-supposing the existence of certain facts the instruction concludes as follows: "Then the said defendant, Frank Steiner, is guilty of murder, and the jury should so find." We have condemned this

form of instruction in two cases, to-wit, *Panton v. People*, 114 Ill. 505, and *Lynn v. People*, 170 id. 527. The reason why an instruction, concluding as the eighth instruction concludes, is held to be erroneous is, that the jury are thereby forced to find the prisoner guilty of murder when they have a right to find him guilty of manslaughter only. Under an indictment for murder a party accused may be found guilty of manslaughter, and, therefore, the jury should be left free to find the accused guilty of either murder or manslaughter, without being specifically directed that they should find him guilty of one offense only, and not the other.

In *Panton v. People*, *supra*, we said: "The last clause of the second above instruction was wrong in saying, 'and you should find him guilty of murder.' Under an indictment for murder a defendant may be found guilty of manslaughter, and the jury here should have been left free to find in that respect, without being directed by the court how they should find. The court should have said no more in such respect in the instruction than that the jury should find the defendant guilty."

Again, in *Lynn v. People*, *supra*, the case of *Panton v. People*, *supra*, was referred to, and the above passage from the latter case was quoted with approval; and, after making the quotation, we said: "The direction by the court in the case at bar was erroneous for the same reason."

After a careful examination of all the instructions, and a comparison of each with the other, we are unable to say, that the eighth instruction was so qualified by any other instruction given, as to relieve it of the errors thus indicated.

Because of the erroneous character of the eighth instruction given for the People, as hereinbefore pointed out, the judgment of the criminal court of Cook county is reversed, and the cause is remanded to that court for a new trial.

*Reversed and remanded.*



DANIEL P. GOTT

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

*Opinion filed October 19, 1900.*

187	249
214	180

1. COUNTY BOARDS—*when special meeting is sufficiently legal to authorize calling grand jury.* A special meeting of the board of supervisors, called some nine days after the written request of at least one-third of the members addressed to the clerk, is sufficiently legal to authorize the board to call a grand jury, although notice of the meeting was published but once, where each member had notice of the meeting and all members were present.

2. NOTICES—*section 3 of act on notices construed.* Section 3 of the act entitled "Notices," providing that whenever the number of publications of a notice required by law is not specified it shall be intended that the same be published for three successive weeks, means, when applied to section 50 of the act on "Counties," concerning special meetings of the board of supervisors, that notice of such meetings shall be published such a number of times, at the rate of once a week, as the lapse of time between the date of the request for the meeting and the date of the meeting makes possible and necessary.

3. JURORS—*when overruling challenge for cause is not reversible error.* Overruling a challenge for cause is not reversible error, even though the juror is incompetent, if the peremptory challenges were not exhausted.

4. NEW TRIAL—*when separation of jury is not ground for new trial.* That the jury were allowed to separate during the trial, but before they had retired to consider their verdict, is not ground for new trial, unless it is shown that the jurors were thus exposed to some outside influence which might have operated to the prejudice of the accused.

5. INSTRUCTIONS—*instruction concerning proof beyond a reasonable doubt, upheld.* An instruction for the People is properly given which holds that the jury need not be satisfied, beyond a reasonable doubt, as to each link of the chain of circumstances relied upon as establishing the defendant's guilt, but it is sufficient if, taking the evidence altogether, they are satisfied of such guilt beyond a reasonable doubt.

WRIT OF ERROR to the Circuit Court of Wabash county;  
the Hon. E. D. YOUNGBLOOD, Judge, presiding.

This is an indictment, found by the grand jury of White county against the plaintiff in error, Daniel P. Gott, for the murder of his wife, Margaret Gott, on the 8th day of June, 1899, in White county. The plaintiff in error was arraigned in open court, and pleaded not guilty to the indictment. A motion was made for a change of venue from White county on account of the prejudice of the inhabitants. This motion was supported by the affidavit of the plaintiff in error. The People, by leave of court, filed cross or counter-affidavits. A change of venue was granted to Wabash county, and the sheriff of White county was ordered to carry plaintiff in error to Wabash county as required by law; and the clerk was ordered to certify a transcript of the proceedings to Wabash county, all of which was done. Thereafter, a motion was made to quash the indictment for the reason stated in the opinion of the court, but this motion was overruled by the trial court, and plaintiff in error excepted to the overruling of the same. A jury was empaneled, and a trial was had in the circuit court of Wabash county; and, on November 24, 1899, the jury retired to consider their verdict, and returned into court a verdict, finding the defendant guilty and fixing his punishment at confinement in the penitentiary for the term of his natural life. The plaintiff in error then made a motion for a new trial, and, in support of some of the reasons urged in favor of a new trial, filed a number of affidavits. The motion for a new trial was overruled; and judgment was rendered upon the verdict, and sentence was pronounced upon the plaintiff in error in accordance therewith. The present writ of error is sued out for the purpose of reviewing the judgment so rendered by the circuit court of Wabash county.

Margaret Gott, the wife of the plaintiff in error, was killed on the night of June 7, 1899, or rather on the morning of June 8, 1899, between the hours of twelve and one o'clock. She was killed by a shot from a pistol; the pistol

ball entered just above her right ear, and ranged a little down and back. Before the breath left the body of Margaret Gott, the plaintiff in error, her husband, ran out of their house partially dressed to one of the neighbors, named Raub, who lived a short distance away from them. He aroused Mr. Raub from his sleep, and stated to him that burglars had entered the house, and robbed him, and shot his wife, and, as he thought, had killed her. He requested Raub to go for Dr. Harrell, and for the city marshal, Moses Willis. The doctor was aroused, and went at once to the house. When the killing took place, no one was in the house except the plaintiff in error and his wife, unless the two burglars mentioned by him were also present in the house. Dr. Harrell found Mrs. Gott lying upon the east side of the bed next to the wall, her left foot hanging off the bed, and the right foot lying just over the edge of the bed. There was a bolster across the head of the bed. The cover was up above her right knee. She was lying a little on the left side with her left arm hanging off the bed, not exactly square on her back, but nearer on her back than her side, her head turned a little to the left; she had a pleasant expression on her face, and gasped once for breath after the doctor came in sight of her. Her gown was buttoned at the top, but pulled apart. Her head was on the edge of the bolster, and there was a powder burn or smoke on it six or eight inches from the head. One of the drawers of the dresser was on the chair, and the other was on the floor. The bottom drawer was pulled nearly out of the dresser, and papers were scattered over the floor. The plaintiff in error requested the doctor to go after Moses Willis, the city marshal, and William Hill, a deputy sheriff, but the doctor stepped across the street and rang the church bell. This brought to the house a number of people living in Norris City, where the parties resided, and where the killing occurred.

The plaintiff in error stated to a number of persons, who came to the house that night, and also stated, in his testimony given before a police magistrate on June 20, 1899, that he was awakened in the night by a noise, which he at first supposed to be mice in the bureau drawer among his papers; that he was lying on the bed by the side of his wife; that, the noise continuing, he awoke and started to put on his pantaloons, when he saw a large man on the floor examining the papers and other articles in one of the bureau drawers; that, upon his attempting to arise, this man "covered" him with his revolver and with the light of his lantern; that he asked the man, if he wanted his money, and told him that he would give it to him; that he thereupon gave the man his purse, which, as he said, contained \$60.00 or \$70.00; that his wife was awakened, and had in her hands, or near her person, a purse with some \$90.00 or thereabouts in it, and also a watch; that there then appeared from the adjoining room a smaller man, whose breath smelt strongly of liquor; that the smaller man approached his wife, and, upon her seeming to resist, he stated to her that she had better surrender her money to the man; that, thereupon, the large man struck him a blow and knocked him over the rocking-chair into the adjoining room through the open door of the latter; that, while he was in the adjoining room, and before he recovered himself, he heard a pistol fired; that some of the silver coin in his wife's purse fell on the floor, and was picked up by one of the men; that the men not only took his purse and his wife's purse, but also his revolver, which appears to have been lying on a chair, or in a bureau drawer; that the men then left the house, he stating at one time or to one person that they both left through the front door, and at another time and to another person that one left through the front door and the other through the back door; that, as they left, they told him upon peril of his life to keep still for five minutes; that, after they left the house, he saw them

upon the road or street in front of the house near a wood-pile or pile of posts; that they were both masked, and he did not see their faces; that the last he saw of them they were close to the pile of posts and going eastward.

Some time after the killing took place, a pistol was found upon the railroad track near the house, where the plaintiff in error lived, with the letters D. P. on it; and the testimony tended to show that this pistol belonged to the plaintiff in error. Bloodhounds were put upon the trail, or were employed to find the trail of the alleged burglars upon the morning of the killing, but they stopped or lost the trail a little way up the railroad track, not a great distance from the house. There was some testimony tending to show that two strange men, hard-looking cases, were in that neighborhood either on the day of the killing, or a day or two before the killing took place. The plaintiff in error was fifty-seven years old, and his wife was sixty-five years old. They had been married about eleven years, and had no children. The State proved, that a woman twenty-seven years old, with two children, lived in a house owned by the plaintiff in error in Norris City. Her name was Mrs. Lou Rankin. It is proven in the case, and principally if not altogether by her testimony, that a criminal intimacy had existed between the plaintiff in error and Mrs. Rankin for about two years prior to the killing of Mrs. Gott. During this time he supported Mrs. Rankin, furnishing her and her children with clothing and provisions and the house they lived in. Mrs. Rankin swears that, about a year before she testified in this case, he asked her to leave Norris City with him. Her husband, who at one time had worked for the plaintiff in error, had been separated from her for some two years, or thereabouts. She also states that, during the existence of this intimacy, he visited her almost every day. At one time he made a trip with her to Cairo, and they staid all night together in one room. He was at her house and in her company on the

evening before the killing; and was also there on the Sunday evening after the killing which, as we understand the evidence, took place on Wednesday or Thursday.

ORGAN & ASHLEY, MUNDY & PHIPPS, and S. Z. LANDES,  
for plaintiff in error.

E. C. AKIN, Attorney General, (GEORGE P. RAMSEY,  
State's Attorney, of counsel,) for the People.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

*First*—A motion was made in the court below to quash the indictment upon the alleged ground that the board of supervisors, which selected the grand jury, were not then holding a legal session. The board was met in extra session when the grand jury was selected. The reason why the extra session is said to have been illegal, is that newspaper notice of the meeting of the board was given one week only, and that three weeks' notice of such meeting was not given. Counsel for plaintiff in error contend, that it was necessary to give three weeks' notice of the extra session of the board of supervisors. Section 50 of chapter 34 of the Revised Statutes, being the act in regard to "Counties," provides that "special meetings of the board of supervisors shall be held only when requested by at least one-third of the members of the board, which request shall be in writing, addressed to the clerk of the board, and specifying the time and place of such meeting, upon reception of which the clerk shall immediately transmit notice, in writing, of such meeting to each of the members of the board. The clerk shall also cause notice of such meeting to be published in some newspaper printed in the county, if any there be." (1 Starr & Curt. Ann. Stat.—2d ed.—p. 1096). Whatever testimony there is in the record in regard to this extra session of the board of supervisors appears in the affidavit of George

T. Ashley, one of the counsel for the plaintiff in error, submitted to the court below in support of the motion to quash the indictment. This affidavit shows, that the meeting was held on July 7, 1899, and that the written request for this special meeting was filed with the clerk of the board on June 28, 1899. It is not denied, that this special meeting was requested by at least one-third of the members of the board, nor is it denied that the request was in writing, and addressed to the clerk of the board. It is furthermore conceded on the part of the plaintiff in error, that each of the members of the board had notice from the clerk of the meeting, and that all of them were present at the meeting. It is also conceded that the notice was published once. Section 4 of chapter 100 of the Revised Statutes in regard to "Notices" provides that, "when any notice is required by law, \* \* \* and it is not otherwise provided, it shall be sufficient to publish the same in a weekly newspaper." (2 Starr & Curt. Ann. Stat.—2d ed.—p. 2822). There was, then, besides the notice given to each of the members of the board, one publication of the notice in a weekly newspaper. We are of the opinion, that sufficient notice was given, and that this special meeting of the board was so far legal as to authorize the board to select the grand jury.

Counsel for the plaintiff in error say that, by the terms of section 3 of chapter 100 in regard to "Notices," "whenever notice is required by law, \* \* \* and the number of publications is not specified, it shall be intended that the same be published for three successive weeks." (Ibid). The contention here is, that this notice was not published for three successive weeks, and, therefore, that the meeting was not properly called. Section 3 of chapter 100 can have no application to the present case. Section 50 of chapter 34 authorizes a special meeting of the board to be held when it shall be requested in writing by at least one-third of the members; and the

written request so made must specify the time and place of the meeting. Inasmuch as at least one-third of the members have the authority to request the meeting and, in their request, to specify the time and place of the meeting, they have the right to fix the time for a day which shall be distant less than three weeks. Such was the fact in the present case. The written request, addressed to the clerk, was made on the 28th of June, and the meeting was fixed for July 7, and three weeks did not intervene between the two dates. The period between the two dates in question was only a little more than one week. It was, therefore, impossible to make publication for three successive weeks. Section 50 only requires the clerk to cause notice of the meeting to be published in some newspaper printed in the county; and this requirement, taken in connection with the preceding portion of section 50, can have no other meaning than that the notice is to be published such a number of times at the rate of one time in each week, as is possible and necessary in view of the date of the meeting as fixed in the written request. It cannot be said that, by the terms of section 50, the number of publications is not specified; on the contrary, we think the meaning of section 50 is, that the number of publications is to be such number, as the lapse of time between the date of the request and the date of the meeting makes necessary and possible, the publication or publications being in a weekly newspaper. For the reason thus stated, we are of the opinion that the court below committed no error in overruling the motion to quash the indictment. Under a former statute of this State, and while section 3 of chapter 100 in regard to "Notices" was in force, this court said: "The mode of calling a special meeting is not specified in the act, and hence there is no means of testing the legality of the call, and any meeting of the board at which a quorum is present must be regarded as valid." (*Town of Ottawa v. LaSalle County*, 11 Ill. 654).



*Second*—It was urged in the court below, as one of the reasons why a new trial should be granted, that one of the twelve jurors, named John Friend, who tried the plaintiff in error, was, at the time of the trial, demented. In support of the claim, that the juror was demented, the affidavit of one Fay K. Waller was read upon the motion for a new trial. In his affidavit Waller swears, that, about four years prior to the time of the making of the affidavit, he, as notary public, administered an oath to Friend; that the affidavit then sworn to by Friend was made in the prosecution of a pension claim; that one of the grounds, upon which the pension was claimed, was that Friend was insane "at times;" and that he then swore, that he was insane "at times." It will be noticed that Waller swears that, four years theretofore, Friend swore that he was insane only "at times," and not always. It does not appear that the time of this trial was one of the times when he was insane. The examination of Friend, before he was accepted as a juror, is in the record, and shows him to have been an intelligent and competent juror. Counsel for plaintiff in error challenged him for cause, and the trial court overruled the challenge for cause. When Friend was examined as a juror, the challenges of plaintiff in error were not exhausted, nor were they ever exhausted, as the plaintiff in error made but five peremptory challenges, although, under the statute, he was entitled to twenty. (1 Starr & Cur. Stat.—2d ed.—p. 1403). When peremptory challenges are not exhausted, it is not reversible error, even if the juror be incompetent, to overrule a challenge for cause. In *Wilson v. People*, 94 Ill. 299, this court said (p. 306): "The defendant exhausted but two of his peremptory challenges, and hence, when he accepted the jurors by whom he was tried, he was entitled to eighteen peremptory challenges; and it must, therefore, be presumed the jurors by whom he was tried were entirely unobjectionable to him." (See, also, *Robinson v. Randall*, 82 Ill. 521).

The court below committed no error in refusing to grant a new trial for the reason thus urged upon our attention.

*Third*—Counsel for plaintiff in error assign as error, that the court below permitted the jurors to separate during the trial of the cause without the consent of plaintiff in error. It is not claimed that, if there was a separation of the jurors, it took place after the jury retired to consider their verdict; but it occurred, if at all, during the trial, and before they retired to consider their verdict. In support of the motion for new trial made in the court below four affidavits, two of them made by counsel for the prisoner, were filed in the case, alleging that, during the trial and on November 23, 1899, four of the jurors went to the barber-shop of one Charles Edmonds to be shaved, and that, upon November 24, two other jurors went to the same barber-shop to be shaved. It is shown clearly by the affidavits of the bailiffs and others that, when the jurors thus went to the barber-shop in question, they were accompanied by one or both of the bailiffs who had the jury in charge. It is not shown, that any juror was allowed to talk or to be talked to, nor is it shown that any juror saw or heard anything prejudicial to the plaintiff in error. It also appears that one of the jurors, named George Rigg, went to his home to get his overcoat, but it appears from the affidavits that he was taken by one of the bailiffs, who had the jury in charge, and that he did not go out of sight of the bailiff. The conduct of the officers in thus permitting the jurors to go where they did go is reprehensible, and cannot be approved by this court, but the affidavits setting up such separation of the jurors as is here alleged, fail to show that the jurors were exposed to any outside influence, or operated on prejudicially to the prisoner. Hence, this judgment of conviction cannot, for that cause alone, be reversed. In *Jumpertz v. People*, 21 Ill. 374, the facts were different from those presented by the present record; as, there, the juror complained of was separated from the bailiff, out of his

presence, sight and hearing, and indeed for a time was engaged in conversation with others. In *Russell v. People*, 44 Ill. 508, also, one of the jurors admitted that he conversed with another person. This record shows, that the jurors in this case were never out of the presence, sight or hearing of the bailiff in charge, and neither saw nor heard anything concerning this case; and the affidavits, filed below by plaintiff in error, allege nothing that tends to show that there was any opportunity for influencing, prejudicing or tampering with the jury.

In *Reins v. People*, 30 Ill. 256, this court, speaking through the late Justice BREESE, said (p. 273): "In capital cases even, where life is at stake, the separation of a jury without consent is not of itself error and ground for a new trial. Something more must be shown. It must be shown that the accused might have been prejudiced by it—that the jurors, or some one of them, might have been tampered with, or improperly influenced, or some means exerted over them, in consequence of their separating, so as to influence their verdict."

In *Miller v. People*, 39 Ill. 457, this court, speaking through the same learned justice, says (p. 467): "As to the misconduct of the officers in suffering individual jurors to separate from the panel after the case was committed to them, in the absence of undue influences upon them while so separate, we would not for that reason set aside a verdict otherwise proper. The officer deserves the punishment of the court, but there is no proof the prisoners have been prejudiced by his misconduct."

In *Adams v. People*, 47 Ill. 376, this court, speaking through the same judge, acting as the chief justice of the court, said (p. 381): "It may be, the officers in charge of the jury were not sufficiently cautious and circumspect, when they conducted the jury to the hotel for refreshments, but it does not appear from the affidavits *pro* and *con*, read on this point, the jury were influenced in the slightest degree by the casual conversation they

might have heard at the hotel, and it is not proved they heard anything prejudicial to the prisoner, or that they discussed the merits before the cause was closed; and it is not shown that the jury were at any time separate and out of the control of the officer in charge. It certainly was the duty of the officers to keep the jury, when at their meals or sleeping, entirely removed from the company of others. They should eat by themselves, and sleep with none present but the officers in charge. \* \* \* It was indiscreet to permit them, during a meal or when in their lodging room, to be in company with others, but unless it is clearly shown they were, by such exposure, operated on in some way to the prejudice of the prisoner, we do not think a verdict, for that cause alone, should be set aside."

We are of the opinion, that no such separation of the jury is shown by the affidavits filed below, as would justify us in reversing the judgment for such cause.

*Fourth*—Counsel for plaintiff in error assign errors in regard to the giving and refusal by the court below of certain instructions. As we understand their argument, they specifically object to two only of the instructions, which were given for the prosecution. One of these is instruction, numbered 10, which told the jury that the rule, requiring them to be satisfied of the defendant's guilt beyond a reasonable doubt to warrant a conviction, "does not require that the jury should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt; it is sufficient if, taking the evidence altogether, the jury are satisfied beyond a reasonable doubt that the defendant is guilty." This instruction was not erroneous under the decisions of this court. In *Weaver v. People*, 132 Ill. 536, we said (p. 542): "The rule is so well settled by repeated decisions, that the reasonable doubt, that will justify and require an acquittal, must be as to the guilt of the accused when the whole of the evidence is considered,

that citation of cases is unnecessary." In *State v. Hayden*, 45 Iowa, 11, the Supreme Court of Iowa held that, where the evidence is circumstantial, the jury need not be satisfied beyond a reasonable doubt of every link in the chain of circumstances necessary to establish defendant's guilt; and, in that case, the court say: "It is not a reasonable doubt of any one proposition of fact in the case which entitles to an acquittal. It is a reasonable doubt of guilt arising upon a consideration of all the evidence in the case." (See, also, *Houser v. State*, 58 Ga. 78; *Jarrell v. State*, 58 Ind. 293). The first of the refused instructions, asked by the plaintiff in error, was properly refused, because it announced the contrary of the doctrine announced in the tenth instruction given for the State.

Plaintiff in error also complains of the refusal of the trial court to give the jury an instruction, directing them to find the defendant not guilty, which instruction was asked at the close of the People's evidence, and was again asked when all the evidence on both sides was concluded. The determination of the question, whether or not the court below erred in refusing to give this instruction, depends upon a consideration of the facts of the case. The evidence in the case was circumstantial. Nothing is known of what occurred, at the time when Margaret Gott was killed, except what the plaintiff in error says about it. There were many facts and circumstances, tending to contradict his account of what took place; and there were other facts and circumstances, tending to sustain his account of it. The question, whether or not his account was truthful and correct, was a question for the jury to settle. After a careful examination of all the evidence, we cannot say that the verdict was not justified by the evidence, and, therefore, it is not our duty to disturb the finding of the jury. We think the court below committed no error in refusing to instruct the jury to find the defendant not guilty.

*Fifth*—As a part of their evidence in chief, the prosecution introduced a copy of the testimony of plaintiff in error taken before the examining magistrate. Counsel for plaintiff in error say, that the court gave a number of instructions, which permit the jury to discredit the testimony of the plaintiff in error so introduced by the People; and they claim that thereby the People put the plaintiff in error on the stand as their witness, and then sought to discredit him by the instructions of the court.

Counsel for plaintiff in error do not point out to us what particular instructions, given for the People, discredit the testimony of the plaintiff in error previously given before the examining magistrate, and a copy of which was read upon the trial by the prosecution. The copy of the testimony of plaintiff in error, so given before the examining magistrate, was introduced by the prosecution without objection on the part of the defense, and was offered as a statement of plaintiff in error made out of court; and it appears, that one witness, who was examined for the prosecution, stated, by agreement of both parties, what plaintiff in error said when he testified before the examining magistrate. Plaintiff in error asked, and the court below gave at his request, instruction numbered 23, which is as follows:

“The court further instructs the jury that in this case the People have offered in evidence the testimony of the defendant, Daniel P. Gott, given by him on his examination before the justice of the peace, for the crime for which he is now on trial, and that the whole of the testimony so read must be taken together, as well that part which makes for the accused, as that which may make against him, and if any part of such testimony is in favor of the defendant, and is not apparently improbable or untrue, when considered with all the other evidence in the case, then such part of his testimony is entitled to as much consideration from the jury, as any other part of his testimony. The testimony, so offered and read for

the People, must be considered as the testimony of the defendant in the case so far as it goes."

The plaintiff in error was not called by either party, upon the trial of this case, as a witness to testify to the occurrences which took place on the night of June 8, 1899. But instruction 23 directs the jury to consider the testimony of the plaintiff in error, as offered and read by the People, as the testimony of the plaintiff in error, and to treat it as though it had been introduced by the plaintiff in error. The only instructions, given for the prosecution, which are in any way of the character suggested by the objection now under consideration, are two instructions, in which the court told the jury that, in weighing the testimony of the plaintiff in error, they had the right to take into consideration the fact, that he was the defendant and was interested in the result of the suit. These instructions were not erroneous in view of the position taken by the plaintiff in error himself, that his previous examination, taken before the examining magistrate, should be regarded as though it had been introduced by himself upon the trial of this case.

The plaintiff in error could not have been injured by any of the instructions, calling the attention of the jury to the fact that he was interested in the result of the prosecution, for the reason that several instructions were given in his behalf, which told the jury that, if they were unable from the evidence to determine whether the defendant or an unknown burglar, as claimed by the defense, fired the fatal shot, or if they believed, from a consideration of all the evidence, that it pointed as clearly to an unknown burglar as the person who committed the crime in question, as it did to the defendant, or if, after a fair and full consideration of all the evidence, the jury entertained any reasonable doubt as to whether an unknown burglar or the defendant was the guilty party, then the jury should consider the case precisely the same, as though it had been proved that some

person other than the defendant fired the fatal shot, and in such case should acquit him. These instructions were favorable to the defendant, and gave him the full benefit before the jury of his own statement that his wife was killed by a burglar, and not by himself.

The judgment of the circuit court is affirmed.

*Judgment affirmed.*

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CHRISTIAN W. ANDERSON

v.

THE CITY OF CHICAGO.\*

*Opinion filed October 19, 1900.*

This case is controlled by the decision in *Kuester v. City of Chicago*, (*ante*, p. 21.)

WRIT OF ERROR to the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

WILLIAM F. CARROLL, and M. F. CURE, for plaintiffs in error.

CHARLES M. WALKER, Corporation Counsel, ARMAND F. TEEFY, and WILLIAM M. PINDELL, for defendant in error.

Per CURIAM: In these cases the ordinances are defective in not describing the "flat stones" on which the curb-stones provided for in the improvement were to rest. Their decision must follow that made in *Kuester v. City of Chicago*, (*ante*, p. 21.) The judgment of confirmation in each case is reversed and the cause remanded.

*Reversed and remanded.*

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\*With this case are decided No. 911, *Greenough v. City of Chicago*, and No. 960, *Thompson v. Same*.



ARTHUR C. THOMPSON *et al.*  
v.  
THE CITY OF HIGHLAND PARK.

*Opinion filed October 19, 1900.*

187	265
d197	571
187	265
207	540

1. ORDINANCES—*caption of ordinance construed as to its sufficiency to cover the provisions made.* The caption of an ordinance purporting to be “for the grading, draining, paving and otherwise improving” a certain street, is broad enough to authorize a provision in the ordinance for making parkways in portions of the street.

2. SPECIAL ASSESSMENTS—*city has power to construct parkways by special assessment.* If the entire width of a street to be improved is not needed for travel, the city has power to provide for the construction, by special assessment, of two paved roadways therein, to be separated, except at street intersections, by a parkway, which shall be covered with loam, seeded with grass and planted with trees.

3. SAME—*when ordinance will not be deemed repealed.* An ordinance for improving a street by constructing two paved roadways therein, to be separated by a parkway, is not repealed, by implication, by a subsequent ordinance granting a street railway company the right to occupy one of the roadways with tracks, where the latter ordinance requires the company to keep such roadway paved with the same material as that used in improving adjacent portions of the street from time to time.

4. SAME—*power of court to re-cast assessment roll.* If, after the filing of an assessment roll, a portion of the cost of the improvement is otherwise provided for, the court may, under section 33 of article 9 of the City and Village act, re-cast the assessment roll by crediting the property owners with their proportionate shares of the amount so provided for.

APPEAL from the County Court of Lake county; the Hon. DEWITT L. JONES, Judge, presiding.

BOWEN W. SCHUMACHER, and WHITNEY & UPTON, for appellants:

It is not in the power of a municipal corporation to deprive the public of a portion of the street,—particularly the center part thereof,—and cause the same to be made into a parkway, sodded and seeded and planted with trees, as the public are thus deprived of a portion

of the street and the adjacent property is made to pay for what might be called, perhaps, an ornamentation, but certainly not a public improvement. *State v. Leffingwell*, 54 Mo. 458; *Cooley on Taxation*, (2d ed.) chap. 20, p. 614; *Mason v. Shawneetown*, 77 Ill. 533; *Chicago v. McCoy*, 136 id. 344; *Harmon v. Chicago*, 140 id. 374; *Quincy v. Jones*, 76 id. 231; *Railroad Co. v. Belleville*, 122 id. 376; *Dillon on Mun. Corp.* sec. 54; *Snyder v. Mt. Pulaski*, 176 Ill. 397; *Smith v. McDowell*, 148 id. 63; *Field v. Barling*, 149 id. 556.

By granting a franchise to a street railway company over the street sought to be improved, and providing therein that said company should pave a portion of said street and permitting it to locate its tracks thereon, the city has rendered the improvement impossible to be made. The improvement cannot now be made according to the ordinance. Therefore there is no ordinance specifying the nature, character, locality and description of the improvement sought to be made, and the court was without jurisdiction to confirm the assessment. *St. John v. East St. Louis*, 136 Ill. 207; *East St. Louis v. Albrecht*, 150 id. 506; *Cass v. People*, 166 id. 126; *Carlyle v. County of Clinton*, 140 id. 512; *Sterling v. Galt*, 117 id. 11; *Gage v. Chicago*, 143 id. 157; *Alton v. Middleton's Heirs*, 158 id. 442; *Rossiter v. Lake Forest*, 151 id. 494; *Pells v. People*, 159 id. 580; *Davis v. Litchfield*, 145 id. 313; *Kankakee v. Potter*, 119 id. 324.

In order to authorize the confirmation of a special assessment against property, not only must the ordinance show the work to be done, but the work must be done according to the ordinance. A property owner cannot be made to pay for part of the work or different work from that called for by the ordinance. *Dorathy v. Chicago*, 53 Ill. 79; *St. John v. East St. Louis*, 136 id. 207; *Rossiter v. Lake Forest*, 151 id. 489; *Pells v. People*, 159 id. 580; *Church v. People*, 174 id. 366; 179 id. 208; *Henderson v. Lambert*, 14 Bush. 24; *Welty on Assessments*, secs. 282, 290, 293, 295, 298; *Lowell v. Wheelock*, 11 Cush. 391; *Dougherty v. Hitchcock*, 35 Cal. 512.

S. F. KNOX, (SMOOT & EYER, of counsel,) for appellee:

The ordinance for the improvement does not embrace more than one subject. It is within the power of the city to cause a strip in the center of the roadway to be graded, sodded and seeded, instead of paved, when the same is done as a part of the general improvement of the street, and to provide for the payment of the same by special assessment. 17 Am. & Eng. Ency. of Law, (1st ed.) 245; Rev. Stat. chap. 24, art. 5, sec. 1, pars. 7, 8; *Essling's Appeal*, 89 Pa. St. 205; *Murphy v. Peoria*, 119 Ill. 509; *Bergman v. Railway Co.* 88 Mo. 678; *Hinsdale v. Shannon*, 182 Ill. 312.

The ordinance permitting the laying of the street railway tracks along that part of St. John's avenue intended to be improved did not repeal or affect the improvement ordinance, so as to prevent the trial court from confirming the assessment. The provision of the street railway ordinance requiring the street car company to pave in like manner its tracks merely relieved appellants from paying for the whole of the improvement, and when the assessment against appellants' property was reduced by the cost of such paving the trial court had given them the benefit of all they could claim, and had jurisdiction to modify and confirm the assessment. *Billings v. Chicago*, 167 Ill. 337; *Chicago v. Cummings*, 144 id. 446.

Mr. JUSTICE HAND delivered the opinion of the court:

This is an appeal from a judgment of the county court of Lake county confirming a special assessment for the improvement of St. John's avenue, in the city of Highland Park, from the southerly line of Laurel avenue to its intersection with the southerly line of Sheridan road. St. John's avenue runs north and south. The ordinance provides for macadamizing two roadways, each eighteen feet in width, on each side of the center line of the avenue, the center of the easterly roadway to be twelve feet

east of the center line of St. John's avenue and the center of the westerly roadway to be twenty-six feet west of the center line of St. John's avenue. The ordinance also provides for a center parkway between the two roadways, to be planted with trees fifty feet apart, graded, leveled, covered with loam and seeded with grass seed. The ordinance also provides that the space between the lot line and the outer line of the gutter, called "outer parkway," shall be graded so as to have a gradual slope from the lot line down to the outer edge of the gutter. Provisions are made for drain-tile, catch-basins and gutters, so that when completed, beginning with the east side of the street, the improvement will be as follows: First, a parkway eighteen feet wide; second, a gutter two feet wide; third, a macadamized roadway eighteen feet wide; fourth, a parkway eighteen feet wide, planted with trees; fifth, a macadamized roadway eighteen feet wide; sixth, a gutter two feet wide; seventh, a parkway four feet wide.

Appellants contend that the ordinance does not authorize the assessment as made, because the caption of the ordinance does not specify anything in reference to parkways. The caption of the ordinance is as follows: "An ordinance providing for the grading, draining, paving and otherwise improving of St. John's avenue, from the southerly line of Laurel avenue to its intersection with the southerly line of Sheridan road." The phrase "otherwise improving" is a broad and comprehensive phrase, sufficient to include almost any improvement of the street. "Otherwise" is defined by the Standard Dictionary as meaning "in a different manner;" "in another way;" "differently;" "in other respects." By Webster, "in a different manner;" "in different respects;" and by the Century Dictionary, "in a different manner or way;" "differently;" "in other respects." So the entitlement does, in fact, fully cover, by its wording, everything provided

for by this ordinance. "If the title fairly gives notice of the subject of the act, so as reasonably to lead to an inquiry into the body of the ordinance, it is all that is necessary." (17 Am. & Eng. Ency. of Law,—1st ed.—p. 245.) "An ordinance of a city entitled 'An ordinance to regulate and prohibit the running at large of animals,' and containing therein provisions for taking up and impounding cattle running at large within the corporate limits of the city, contains a title sufficiently extended to embrace also a section prohibiting any person from breaking open the enclosure used by the city as a pound and forbidding the unlawful taking and driving therefrom of animals impounded therein." (*Smith v. City of Emporia*, 27 Kan. 528.) We held in the case of *Village of Hinsdale v. Shannon*, 182 Ill. 312 (on p. 315): "No provision of the statute requires a description of the nature, character and locality of the improvement to be stated in the caption of the ordinance." The ordinance is clearly sufficient, and is not rendered uncertain by reason of the caption failing to state that its purpose was, in part, to provide for a parkway.

It is next objected that the city council exceeded its powers in attempting to levy a special assessment to pay for grading, sodding and treeing a park in the middle of the street. The proposed improvement provides for two roadways, each eighteen feet wide,—not counting the gutters, which add two feet more to each roadway,—with a strip of grass-land between said roadways eighteen feet wide, which is to be planted with trees at intervals of fifty feet. It is not an unbroken strip, but has two wide openings through it at the junction of intersecting streets, so as to connect the two roadways and permit access from one to the other as well as to adjoining streets. St. John's avenue is eighty feet wide and is a main thoroughfare through Highland Park. The control of the streets in cities and villages, and the power to improve the same, are by the statute placed under the supervision

and control of the city council in cities and the board of trustees in villages, and in the exercise of such powers the manner of improvement must, of necessity, to a large extent be left to the discretion of these bodies.

In *Murphy v. City of Peoria*, 119 Ill. 509, the ordinance provided that the street should be graded and graveled; that twenty-four feet in width in the center of the street should be graded and sodded with good sod. After reviewing the provisions of the special charter of the city of Peoria giving the city council control over its streets, and which are substantially the same as are conferred upon cities and villages under the City and Village act, we say (p. 511): "It is obvious \* \* \* that the control of the streets, and the power to improve, is placed in the hands of the city council, and in the exercise of these powers the manner of the improvement must, of necessity, to a large extent be left to the discretion of that body. It is true that the charter does not, in express words, declare that the city council may grade and sod a portion of the street; but we think it is manifest that such power is included under the general authority to control and improve, conferred on the city council by the charter. Where a street is of such a width that the entire street is not needed for the public travel, and the city council deem it wise to sod a portion thereof instead of graveling the entire street, we see no good reason why they may not properly, under the general power to control and improve, adopt that method of improvement." Under the authority of this case we do not think the city council exceeded its powers in providing for the improvement of the parkway in question and for the payment of the same by special assessment.

The improvement ordinance was passed on the 25th day of February, 1896. The commissioners appointed by the city council to make an estimate of the cost of said improvement made their report on the 3d day of March, 1896. The petition for the levying of the assessment was

filed on the 9th day of March, 1896. On the 12th day of March, 1896, an order was entered by the court appointing commissioners to make the assessment. On the 26th day of March, 1896, the commissioners filed the assessment roll, and on the 12th day of May, 1896, the re-cast assessment roll, and on the 28th day of November, 1899, the assessment was confirmed. On the 25th day of January, 1897, the city council of Highland Park passed another ordinance, which was subsequently amended, granting a city railway company, and its successors, a franchise to construct a street railway through the city and over the street in question. Said railway was completed on the street in question about the first day of May, 1898, and now occupies with its double tracks the entire west roadway proposed to be macadamized. The ordinance also provided that said street railway company should pave, and keep paved, at its own expense, such portion of said street as is occupied by its tracks, with the same material as that with which adjacent portions thereof shall from time to time be paved or improved.

The claim is made by appellants that the ordinance, and the amendments thereto, in regard to said street railway, have rendered the improvement of said street as contemplated by the paving ordinance impossible of performance; that said paving ordinance thereby has been repealed, and that there is no ordinance now in force specifying the nature, locality and description of the improvement proposed to be made. The street railway ordinance does not in express terms repeal, amend or modify the improvement ordinance. No change is made in the character of the improvement, and the identity thereof is in no sense destroyed or affected. *St. John v. City of East St. Louis*, 136 Ill. 207, is relied upon by appellants as an authority sustaining their position. In that case a material part of the improvement as required by the original ordinance was abandoned, and it was properly held that the special assessment for the whole

cost of the work could not be collected. No such case is made here. On the contrary, the improvement, when completed, will be in accordance with the specifications of the original ordinance.

The effect of passing an ordinance for paving an entire street, a portion of which was occupied by a city railway company which, under its ordinance, was obligated to pave the portion occupied by it, came before this court in the case of *City of Chicago v. Cummings*, 144 Ill. 446. In that case the middle sixteen feet of the street was occupied by the Chicago West Division Railway Company with double tracks. An ordinance was introduced in evidence making it the duty of the company to grade, pave and keep in repair the portion of the street occupied by it. Commissioners were appointed to make the assessment and return the roll without excluding the cost of paving the sixteen feet. The court, on page 449, say: "It does not follow, as seems to be supposed, that the ordinance providing for the improvement is therefore void. It properly required the improvement of the entire street, if, in the opinion of the municipality, so much was required or necessary to the public convenience; but the city having required the railway company 'to fill, grade, pave and keep in repair during all the time,' it has the privilege of using said streets, sixteen feet in width, where a double track is used, etc., 'in accordance with such ordinance as the city council may pass respecting such filling, grading, paving or repairing,' and requiring the same to be done by the railway company with like material, in like manner and at the time it is required in respect of the rest of the street, etc. The cost of paving so much of said street should have been excluded from the estimate."

We do not regard the ordinance giving the street railway company the right to occupy St. John's avenue a repeal or modification of the ordinance providing for the improvement thereof.



In the case of *City of Chicago v. Cummings, supra*, the ordinance granting the street car company the right to occupy the street sought to be improved was passed prior to the improvement ordinance. In this case the street car ordinance was passed after the improvement ordinance and after the estimate had been made and the assessment roll filed. The cost of the improvement, therefore, of the west roadway, which was to be borne by the street railway company, could not have been deducted from the estimate. Before the assessment was confirmed, however, the city made a motion before the trial court to reduce the amount of the assessment against appellants' property, proportionately, by the amount it would cost to pave the west roadway occupied as a right of way by the street railway company, and offered proof showing what that cost would be, based upon the cost of the entire improvement as estimated by the commissioners appointed under the ordinance. The court found the cost of that portion of the improvement to be \$3156.05, and ordered the assessment roll to be modified by reducing the amount assessed against the respective lots of land, proportionately, by said amount, and, after such reduction had been made, confirmed the assessment. Appellants did not introduce any evidence or dispute the fact of the correctness of said amount, but claimed, as a matter of law, the court had no authority to make such reduction.

Section 33 of article 9 of the City and Village act (Rev. Stat. 1874, p. 236,) provides: "The court before which any such proceeding may be pending, shall have authority, at any time before final judgment, to modify, alter, change, annul or confirm any assessment returned, as aforesaid, or cause any such assessment to be re-cast by the same commissioners whenever it shall be necessary for the attainment of justice, or may appoint other commissioners in the place of all or any of the commissioners

first appointed, for the purpose of making such assessment, or modifying, altering, changing or re-casting the same, and may take all such proceedings and make all such orders as may be necessary to make a true and just assessment of the cost of such improvement according to the principles of this act, and may from time to time, as may be necessary, continue the application for that purpose as to the whole or any part of the premises."

In the case of *Jones v. Town of Lake View*, 151 Ill. 663, the court, in considering the right of the trial court to modify or change an assessment, on page 681 says: "The court may undoubtedly supervise, upon proper objection, the exercise of the power by the commissioners, and, indeed, as we have already seen, (sec. 33, art. 9, chap. 24, Rev. Stat.) the court is given power, at any time before final judgment, to modify, alter, change and annul, or re-cast, any assessment, and to take all such proceedings and make all such orders as may be necessary to make a true and just assessment according to the principles of the act; and in cases of fraud, corruption, oppression or departure from the principles governing in like cases, it would be the duty of the court to set it aside, or to cause the same to be so changed as to make a just and true assessment. This, however, is to the court, and with which the jury have nothing to do."

We are of the opinion the court had power to modify the re-cast assessment roll by crediting to the several owners their proportionate shares, respectively, of the amount of the cost of paving the west roadway.

We have examined all the objections filed and find no reversible error in this record. The judgment of the county court will therefore be affirmed.

*Judgment affirmed.*

JOHN CANTWELL *et al.*

v.

A. S. WELCH, Receiver.

187 275  
208 256*Opinion filed October 19, 1900.*

1. **LOAN ASSOCIATIONS**—*effect of officers' representation that payment of certain amount will mature stock.* Subscribers of the capital stock of a loan association are charged with notice of the provision of the statute requiring payment of installments to continue on each share until the same shall reach maturity value; and this provision cannot be displaced by the representation of the officers of the association that payments for a fixed period shall operate to mature the stock or be accepted as accomplishing that result.

2. **SAME**—*monthly premiums are properly included in foreclosure decree.* If the by-laws of a loan association provide for the payment of the premium in monthly installments instead of a gross sum, it is proper, where the shares of stock have not attained maturity value, to include in the foreclosure decree the amount of premiums due from the time of default to the date of the decree.

3. **TRIAL**—*general objection to evidence only raises question of relevancy or materiality.* A general objection to the introduction of a certified copy of a resolution by the board of directors of a loan association authorizing the institution of the foreclosure proceeding, does not raise the point that the secretary's certificate fails to show that he is the keeper of the records and official papers.

*Cantwell v. Stockmen's Building, etc. Union*, 88 Ill. App. 247, affirmed.

**APPEAL** from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding.

This was a bill in chancery for a decree foreclosing a real estate mortgage executed by the appellants to the appellee union. The appellee union was incorporated May 14, 1890, under the act in force July 1, 1879, and acts amendatory thereof, (Hurd's Stat. 1899, p. 450,) authorizing the incorporation of mutual building, loan and homestead associations. The appellant John Cantwell subscribed for twenty shares, of the par value of \$100 each, in the fourteenth series of the capital stock of the union, to be paid, as the by-laws provided, in monthly

installments of \$16 as dues. He applied for, and on the 14th day of July, 1891, was granted, a loan in the sum of \$2000, to bear interest at the rate of six per cent per annum, payable monthly, in sums of \$10 per month, and he also agreed to pay as a premium for such advance loan seven per cent per annum on the amount of the loan, such premium to be paid, according to the requirement of the by-laws, in monthly installments of \$11.66, until the said sum so borrowed should be re-paid or the shares of stock fully matured. Said borrower, and Margaret, his wife, to secure the re-payment of the loan, executed a mortgage on the premises in question, and in addition thereto assigned the said twenty shares of stock to the union as further security for the money so borrowed. The appellants met each monthly demand for interest, premium and dues to and including the month of October, 1896, and thereafter failed to meet any of such payments. On August 12, 1898, the bill to foreclose the mortgage was filed. Decree was entered in the circuit court of Cook county foreclosing the mortgage and ordering sale of the premises. An appeal by the appellants to the Appellate Court for the First District resulted in an affirmance of the decree, and the cause comes to this court by the further appeal of the appellants.

R. G. MARRIOTT, (MYER S. EMRICH, of counsel,) for appellants.

GEORGE V. MCINTYRE, for appellee.

Mr. CHIEF JUSTICE BOGGS delivered the opinion of the court:

The statute under the authority whereof the appellee corporation was created and has existence, provides that subscriptions to its capital stock shall be made payable in periodical installments, (not exceeding two dollars on each share,) and that payment of such installments shall continue on each share until the same shall reach matu-

rity value or be withdrawn or retired. Subscribers to the capital stock of associations of this character are held to notice of the provisions of the statute, by which alone the corporation has authority to issue stock or transact its business. The statutory provision that the periodical payment of dues shall continue until the share has reached maturity cannot be displaced by a mere representation or promise of the officers of the corporation that payments at a fixed sum, if paid for a fixed period of time, will or shall operate to mature the stock or will or shall be accepted as accomplishing that result. (*King v. International Building Union*, 170 Ill. 135.) The proffered testimony that the secretary of the union said to or promised the appellants that monthly payments in the sum of \$37.66 (being dues \$16, interest \$10 and premium \$11.66,) for a period of five and a half years would or should mature the stock and thereby discharge the mortgage debt was properly excluded.

A by-law of the union provided that in the case of non-payment of interest and fines for a period of six months, payment of the principal, interest and fines may be enforced, upon the order of the board of directors, by proceedings at law or in equity against the security. Appellants cite Endlich on Building and Loan Associations, (2d ed. p. 58,) to the effect no forfeiture can be declared by the appellee union except it be done by resolution of the board of directors, and also insist there is no allegation in the bill that the board of directors had declared the appellants to be in default, or had entered an order declaring a forfeiture and directing proceedings to be instituted to foreclose the mortgage, and urge the bill is insufficient to support the decree. This contention can not be maintained. The allegation of the bill is, that default in the making of such payments has continued for more than six months, "and that by reason thereof your orator (appellee) has elected, and does hereby elect, to declare the whole of the sum secured by said note and

mortgage immediately due and payable." The appellants treated this allegation as an attempt, at least, to allege forfeiture and requisite authority to institute the action, and made answer thereto as follows: "These defendants, jointly and severally, further answering, deny that the said complainant corporation has the right to declare said note and mortgage forfeited, as it has in its bill alleged, because they say that it is provided by the by-laws of the said corporation, in section 7 of article 9, as follows: 'That in case of non-payment of interest and fines for the space of six months, payment of principal and interest and fines may be enforced by proceedings against the securities according to law, upon the order of the board of directors.' These defendants, jointly and severally, further answering, say that it does not appear from the complainant's bill of complaint filed heretofore, or in the amendment thereof, that said board of directors, or any of the proper officers of said complainant corporation, ever authorized or ordered the bringing of said foreclosure proceedings."

The chancellor correctly regarded the allegations of the bill and answer as raising, as to this point, an issue of fact whether the board of directors of the appellee union had taken the action required by the by-law set out in the answer, and therefore properly overruled the general objection preferred by the appellants to the admission in evidence, at the instance of the appellee, of a copy of a resolution adopted by the board of directors of the union directing this proceeding to be instituted for a decree foreclosing the mortgage, to which copy was appended the certificate of the secretary of the appellee union, under its corporate seal, that the same was a true copy of the resolution adopted by the said board. The objection to this instrument being general, only raised questions as to its relevancy as testimony. Under a general objection it cannot be urged in this court that the copy should have been rejected by the circuit court for

the reason the certificate of the secretary appended thereto did not contain a statement that said secretary was the keeper of the records and official papers of the corporation, in accordance with the provisions of section 16 of chapter 51 of the Revised Statutes, entitled "Evidence and Depositions." A general objection to an instrument offered in evidence raises questions of its relevancy or materiality only,—not a special objection such as this, which might have been removed in the trial court had it been there disclosed. *Buntain v. Bailey*, 27 Ill. 409; *Moser v. Kreigh*, 49 id. 84; *Osgood v. Blackmore*, 59 id. 261; *Hyde v. Heath*, 75 id. 381; *Johnson v. Holloway*, 82 id. 334; *Wilson v. King*, 83 id. 232; *King v. Chicago, Danville and Vincennes Railroad Co.* 98 id. 376; *Gage v. Eddy*, 186 id. 432.

The decree debt, as awarded by the chancellor and affirmed by the Appellate Court, included monthly installments of both interest and premiums on the sum borrowed from the date of default to the rendition of the decree, but denied and excluded fines for the non-payment of dues, interest and premiums for the like period. It is insisted the monthly installments for premiums on the loan should not be allowed after the expiration of six months after the default of the appellants in making payments,—that the account as to the premiums should have been stated by the master as of the date of the expiration of said six months. Loans made by the union are but the preference enjoyed by a stockholder to receive the amount of his stock in advance of maturity. All stockholders cannot enjoy such preference, and the privilege, in this case, was determined by offering the money at public auction to the stockholder who would bid the highest annual rate of premium for such preference. Section 8 of chapter 32 of Hurd's Statutes of 1897, (par. 85, p. 441,) authorized the course pursued by the union in this matter. This section authorizes such associations to deduct the entire premium in a gross sum, or to allow it to be paid in proportionate amounts or in-

stallments, as was done in this instance. The consideration for the premium is the right to receive in cash, by way of an advanced loan, the par value of the shares of stock held by a borrower. The by-laws of the appellee union provided this premium should be paid monthly in advance instead of being paid in a gross sum in advance. The bond executed by the appellants, and the mortgage given by them, stipulated for the payment of the premiums until the stock should be matured, the clause in the mortgage being as follows: "And is also conditioned for the additional payment of seven per cent per annum as a premium, to be paid in monthly installments of \$11.66, commencing on the last Saturday of July, A. D. 1891, and payable on the last Saturday of each and every month thereafter, said payments of principal, interest and premium to be continued to be paid until said sum of \$2000 is fully paid, or until each share of stock in the fourteenth series issued by said union shall have attained the value of \$100." The shares of stock had not attained such value at the time of the accounting by the master, and the inclusion of the monthly premiums to the date of the accounting was but to observe the contract and agreement of the parties. Section 6c of chapter 32 aforesaid provides that on voluntary settlement and payment of a loan the borrower shall be charged with the full amount of such advance, together with all arrearages, and credited with withdrawal value of his shares. Section 6b of said chapter provides the withdrawal value of stock shall be the amount of dues paid on the shares, and such interest as may be fixed by the by-laws. The by-laws of the appellee union allowed five per cent annual interest on stock withdrawal. The master ascertained the withdrawal value of appellants' shares of stock in accordance with the provision of the statute and of the by-laws, and placed the amount thereof to the credit of appellants in the accounting. Payment of the premiums was the consideration for the preference



granted to appellants to enjoy the full face of their stock in advance of its maturity. They secured the preference by bidding a greater premium therefor than their fellow shareholders who wished like preference were willing to give. They expressly agreed to pay such premiums monthly until the stock had reached par value, but failed to keep the agreement. They enjoyed the fruits of the preference until the time of the accounting by the master. Then the withdrawal value of their stock was ascertained and the same credited to them, and it was entirely proper, and but justice to their fellow-shareholders, to charge them with all unpaid premium installments to that date.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

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THE CHICAGO GREAT WESTERN RAILWAY COMPANY

v.

WILLIAM MOHAN.

*Opinion filed October 19, 1900.*

**PRACTICE**—*time when peremptory instruction should be presented.* In order that the refusal of a peremptory instruction to find for the defendant may be preserved for review, on appeal, the instruction should be presented at the close of the plaintiff's evidence or at the close of all the evidence, and not as one of the series submitting the case to the jury.

*Chicago Great Western Ry. Co. v. Mohan*, 88 Ill. App. 151, affirmed.

**APPEAL** from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding.

HENRY A. GARDNER, and HENRY L. STERN, (SIGMUND ZEISLER, of counsel,) for appellant.

WING & CHADBOURNE, for appellee.

187	281
93a	141
187	281
191	248

187	281
208	499

Mr. JUSTICE HAND delivered the opinion of the court:

Appellee obtained a judgment against appellant in the circuit court of Cook county, which has been affirmed by the Appellate Court for the First District.

The chief complaint made in this court is that the trial court refused to hold, as a matter of law, that the plaintiff was guilty of contributory negligence, and appellant contends that question is preserved by the refusal of the following instruction: "The jury are instructed to find the defendant not guilty." We are of the opinion the instruction and the refusal thereof do not preserve the question sought to be raised by appellant. It appears from the abstract the defendant asked thirty-seven instructions, numbered 1 to 37 inclusive, which were given; also eight instructions, numbered 1 to 8 inclusive, which were refused. The instruction directing the jury to find the defendant not guilty is the first of the refused instructions. The refused instructions appear in the abstract after those given, and were apparently asked and refused at the same time as the given instructions. If a party desires to rely on a peremptory instruction to find for the defendant, such instruction must be asked at the close of the evidence for the plaintiff or at the close of all the evidence. It is too late to submit an instruction of that character with a series of other instructions. *Peirce v. Walters*, 164 Ill. 560; *Vallette v. Bilinski*, 167 id. 564; *Calumet Electric Street Railway Co. v. Christenson*, 170 id. 383; *Chicago, Burlington and Quincy Railroad Co. v. Murowski*, 179 id. 77.

The objection is also made that the court excluded proper evidence. It is sufficient to say, as did the Appellate Court, that in the respects complained of no exception was taken by the appellant to the exclusion of the evidence.

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

GEORGE P. BRAUN *et al.*

v.

S. F. HESS &amp; Co.

*Opinion filed October 19, 1900.*

187	283
93a	*222

187	283
194	*586

187	283
102a	*674

1. **INTEREST**—*what constitutes a contract to pay interest.* A contract to pay interest is evidenced by invoices bearing the words, "Bills bear interest after maturity, \* \* \* terms sixty days," which were sent with each shipment to the purchaser, who received the goods upon the terms stated in the invoices.

2. **CONTRACTS**—*when contract is that of the agent and not of the principal.* A guaranty against loss of rebates on account of handling the goods sold by one who signs the guaranty in his own name as "Gen'l Agt." of a corporation, is the individual contract of the agent, unless it is shown by the evidence that he had authority to bind the corporation by the guaranty.

3. **PRINCIPAL AND AGENT**—*what is not an implied power of general agent.* Authority of the general agent of a corporation handling cigarettes and tobacco to bind the corporation by a contract with a purchaser of its goods, guaranteeing him against loss of rebates from another corporation on account of his handling such goods, is not implied, as a matter of law, from the mere fact of agency.

*Heegaard v. S. F. Hess & Co.* 86 Ill. App. 544, affirmed.

**APPEAL** from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. W. CLIFFORD, Judge, presiding.

ASHCRAFT & GORDON, (R. M. ASHCRAFT, of counsel,) for appellants.

DARROW, THOMAS & THOMPSON, (MORRIS ST. P. THOMAS, of counsel,) for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

This is an action of assumpsit, brought by appellee, a corporation doing business in Rochester, New York, to recover a balance claimed to be due it on an open account for cigarettes and tobacco sold and delivered to

William H. Heegaard, of whose will the appellants are executors. The declaration contains the common counts only, and the pleas are the general issue and set-off. The first trial resulted in a verdict and judgment against appellee for \$286.86, which, on appeal to the Appellate Court, was reversed and the cause remanded. (54 Ill. App. 227.) On the second trial the court instructed the jury to find the issues for the plaintiff and to assess the plaintiff's damages at the sum of \$903.08, with interest thereon at the rate of five per cent per annum from October 26, 1890, to the day of trial, which resulted in a verdict and judgment in favor of appellee for the sum of \$1260.49. This judgment was affirmed by the Branch Appellate Court for the First District, and the present appeal is prosecuted from such judgment of affirmance.

It is first contended by appellants that the court erred in peremptorily instructing the jury to find for the plaintiff. As we understand the evidence of Mr. Heegaard, as abstracted, the goods sued for by appellee had all been received by him; that the purchase price thereof was \$914.03, from which should be deducted \$10.95 freight paid by him, which left \$903.08 due the plaintiff. We think it can fairly be said from the evidence there was no dispute as to the amount of appellee's claim.

It is further contended the court erred in instructing the jury to allow appellee interest on its claim from October 26, 1890, to the date of trial. At the head of each invoice sent by appellee to Heegaard at the time the goods were shipped, appear the following: "Bills bear interest after maturity, and are subject to sight draft;" also the words, "Terms sixty days, two per cent discount for cash within ten days." The date of the last bill was August 26, 1890. The goods were shipped by appellee and received by Heegaard upon the terms stated in the invoices, which constituted, under the circumstances, a contract to pay interest. The case of *Lambeth Rope Co. v. Brigham*, 170 Mass. 518, which was an action to recover

the price of goods sold, is an authority directly in point. The court, on page 522, say: "It appeared that the plaintiff was accustomed, when it sent the goods, to send a bill of them, on the face of which were the words, 'Terms thirty days.' The judge instructed the jury as follows: 'Now, if all of those bills for these goods were in this form, terms stated at thirty days, and the party took the goods with that upon it and made no objection to that in any way, it would be an implied agreement that that was the time within which the goods were to be paid for, and that if they were not paid for, after that time interest would begin to run by way of damages from the expiration of thirty days.' There is no evidence of any express agreement in regard to the time when the goods should be paid for nor in regard to the time when interest should begin to run. We are of the opinion that the instruction was correct. In the absence of any agreement the price of the goods would be payable on delivery. The parties could make any agreement about it that they chose to make. If the plaintiff notified the defendant that it was willing to give him a credit of thirty days on each bill and that the price would be payable at the expiration of that time, it was a proposition in the defendant's favor, and if he made no objection his assent would be implied, and he would be bound by the contract."

We think that the court did not err in instructing the jury to find for appellee, unless the defense set up in the plea of set-off was sustained.

The plea of set-off filed by defendant alleged that, before plaintiff's cause of action accrued, defendant was purchasing cigarettes from the American Tobacco Company, and was receiving a rebate thereon of thirty cents a thousand in consideration that defendant would not sell cigarettes manufactured by any other person; that in consideration that defendant would purchase of plaintiff certain cigarettes manufactured and sold by plaintiff, known as "Creoles" and "Diadems," plaintiff promised

the defendant to indemnify and save him harmless against and from any loss of rebates from the American Tobacco Company on account of handling plaintiff's cigarettes; that defendant, relying upon such promise, and upon the sole consideration thereof, bought of plaintiff a large number of cigarettes and paid plaintiff large sums of money therefor; that defendant also bought from said American Tobacco Company a large number of its cigarettes and paid it large sums of money therefor, and by reason of making the aforesaid promises with the plaintiff, and by reason of selling and handling the plaintiff's cigarettes, defendant lost large sums of money from the American Tobacco Company, to-wit, the sum of thirty cents per thousand on all the cigarettes of the American Tobacco Company, sold by defendant, which sums the plaintiff refused to pay to defendant, etc., to the damage of the defendant of \$1500, etc. To sustain the defense set up in said plea the defendant introduced in evidence the following memoranda or agreements:

"51 WABASH AVE., CHICAGO, ILL., May 26, 1890.

"*Mess. W. H. Heegaard & Co., City:*

"GENTLEMEN—We will guarantee you from any loss of rebates from the American Tobacco Co. on account of handling Creole and Diadem cigarettes.

"Yours truly,

J. E. AVERY,  
*Gen'l Agt. S. F. Hess & Co."*

"CHICAGO, May 28, 1890.

"*Mess. W. H. Heegaard & Co., City:*

"GENTLEMEN—We, in consideration of your handling our cigarettes, guarantee that you will receive the rebate of 30c pr. M on all cigarettes you handle manufactured by the Amer. Tob. Co. or its branches, from April 1, 1890, until April 1, 1891.

"Yours truly,

J. E. AVERY,  
*Gen'l Agt. S. F. Hess & Co., Rochester, N. Y."*

The controlling question in this case is, did the evidence show that J. E. Avery had authority to execute said memoranda or agreements, and thereby bind appellee? The law is well settled in this State (*Powers v.*

*Briggs*, 79 Ill. 493; *McNeil v. Shober & Carqueville Lithographing Co.* 144 id. 238; *Frankland v. Johnson*, 147 id. 520;) that these agreements on their face are the individual obligations of J. E. Avery, and not of appellee. The words, "Gen'l Agt. S. F. Hess & Co.," following the signature of J. E. Avery, are mere *descriptio personæ*. The burden of proof was upon the defense to show authority on the part of Avery to execute said memoranda or agreements. There is no pretense that any proof whatever was offered of express authority from the appellee to Avery to execute the particular memoranda or agreements offered in evidence. There was, therefore, an entire absence of proof of such authority, unless it can be said that the proof shows that J. E. Avery was the general agent of the appellee, and therefore had implied authority to bind appellee by such memoranda or agreements. Conceding such general agency was established, such authority, in our judgment, is not implied as a matter of law. The appellee having made a clear case, and the defense having failed for want of proof tending to establish a fact material and necessary thereto, the instruction directing a verdict for the appellee was proper.

The case of *Kinser v. Calumet Fire Clay Co.* 165 Ill. 505, is upon the facts very much like the case at bar, and, we think, decisive thereof. On page 508 we say: "It is clear that the evidence introduced on behalf of the plaintiff entitled it to the judgment rendered, unless the defense set up in the plea of set-off was sustained. It is not claimed that any proof whatever was offered of express authority from the plaintiff to Hartford to enter into a contract like that set up in the plea. There was therefore an entire absence of proof of such authority, unless it can be said that, being the agent of the company to sell its sewer-pipe, authority to bind it by his agreement that a purchaser should lose nothing upon a contract is implied,—and such is clearly not the law. (*Toledo, Wabash and Western Railway Co. v. Elliott*, 76 Ill. 67; *Cooley v. Per-*

rine, 41 N. J. L. 322; Story on Agency,—9th ed.—sec. 170.) If, then, what was said between the parties, as detailed by the defendant, amounted to a contract on behalf of the plaintiff to re-pay the defendant all money which he might lose on the Anderson contract, (which is certainly very doubtful,) the plaintiff is not bound thereby, because no authority to make it was shown. The plaintiff having made a clear case, and the defense wholly failing for want of proof tending to establish a fact material and necessary thereto, the court was justified in peremptorily instructing the jury to find for the plaintiff."

We are of the opinion that the circuit court did not err in refusing to allow the defense to introduce proof showing a custom of agents of cigarette manufacturers to make contracts for rebates in the city of Chicago at about the time the memoranda or agreements offered in evidence bear date, as the testimony of Mr. Heegaard shows he did not rely upon a custom at the time the memoranda or agreements offered in evidence were made, but that he relied upon the statement of Avery that he had obtained authority from his principal to make such contract. Before the contract was made, as appears from Mr. Heegaard's testimony, Avery, in effect, informed him he had no authority to make such agreement, but that he would consult his principal in Rochester, where he expected to go in a short time; that no contract was made until his return from Rochester, when he informed Heegaard it was all right, and gave him the memoranda or agreements offered in evidence.

We are of the opinion there is no reversible error in this record, and that the judgment should be affirmed.

*Judgment affirmed.*



## THE WABASH RAILROAD COMPANY

v.

THE PEOPLE *ex rel.* Patterson, County Collector.*Opinion filed October 19, 1900.*

1. **TAXES**—*tax to pay improvement bonds is not included in statutory limit on city taxes.* In determining whether the amount levied by an appropriation ordinance exceeds the statutory limit of two per cent, an amount levied to pay bonds and interest, issued to raise money to pay for an improvement built by general taxation, should be excluded.

2. **SAME**—*what objects are not properly "building purposes."* The placing of a steam heating apparatus in a school building, to replace an old one; the re-construction of a part of the basement; changing the system of drainage in the basement and constructing a stone walk around the school building, are matters which should be provided for under the tax levied for "educational purposes," and not for "building purposes."

APPEAL from the County Court of Moultrie county;  
the Hon. JOHN D. PURVIS, Judge, presiding.

This is an appeal from a judgment of the county court of Moultrie county, rendered against the property of the appellant company at the June term, 1899, upon the application of the county treasurer or collector for judgment against lands reported delinquent for the taxes of 1898.

Seven objections were filed by the appellant to the rendition of judgment against its property. All of these objections were sustained by the trial court, except the second and fourth which were overruled; and an exception to the overruling of the same was duly entered by appellant.

E. J. MILLER, for appellant:

A school board or board of school directors has no authority to levy a tax for building purposes except by a vote of the tax-payers. *Greenwood v. Gmelich*, 175 Ill. 526.

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215	*181

Boards of education in cities and school directors and township boards of education have the same powers, so far as raising a building fund is concerned, and none of them can do it without a vote of the people expressly authorizing it. *Greenwood v. Gmelich*, 175 Ill. 526; *Beverly v. Sabin*, 20 id. 357; *Pennington v. Coe*, 57 id. 118; *Thatcher v. People*, 93 id. 240; *School Directors v. Fogleman*, 76 id. 189; *Railroad Co. v. People*, 163 id. 616.

The levy was made to pay for building a sidewalk, making repairs to school buildings and putting in steam heat in the north building; also for paying \$500 interest on bonds, and paying \$2000 of bonds which mature in 1899. The above purposes are not building purposes, but educational purposes. *Railroad Co. v. People*, 163 Ill. 616; *Weber v. Railroad Co.* 108 id. 451; *Railroad Co. v. People*, 155 id. 276; *Railroad Co. v. People*, 147 id. 196; *Thatcher v. People*, 93 id. 240.

W. K. WHITFIELD, State's Attorney, JOHN V. BURNS, and FRANK SPITLER, for appellee:

When the school board has ascertained the amount necessary to be raised and has certified the same, within the limitations fixed by the statute their determination of the amount required, as shown by their certificate, is conclusive. *Lawrence v. Traner*, 136 Ill. 486.

When taxes levied for a proper purpose by a body authorized by law to impose them do not exceed the amount or rate allowed by law, even the fact that it may be proposed to divert them to another purpose, and even though such purpose be illegal, will not authorize a court of equity to restrain their collection. After the collection of the tax, equity will interpose and prevent its misappropriation. *Lemont v. Stone Co.* 98 Ill. 94; *Lawrence v. Traner*, 136 id. 483.

It is unlawful for a board of directors to purchase or locate a school house site, or to purchase, build or move a school house, without a vote of the people, (Rev. Stat.

chap. 122, art. 5, sec. 31,) and it is also unlawful for them to borrow money, issuing bonds therefor, in order to furnish money for building school houses or purchasing school sites; or to borrow money, and to issue bonds therefor, with which to repair and improve school houses and school house sites, without a vote of the people, (Rev. Stat. chap. 122, art. 9, sec. 1,) but the law makes it their duty to establish and maintain free schools for the number of months, annually, fixed by the statute, and to pay the necessary amount required for that purpose, and clothes them with the necessary discretion and power to raise sufficient money, by taxation, for the foregoing purposes, and to discharge the duty thus imposed by a levy, annually, of not more than two per cent for educational and three per cent for building purposes, without a prior vote of the people. Rev. Stat. chap. 122, art. 8, secs. 1, 2.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

*First*—Appellant's fourth objection as made in the trial court is, that the city tax of the city of Sullivan, as extended against appellant's property, is in excess of the amount allowed by law to the extent of \$63.46; and, therefore, appellant objects to the payment of \$63.46 of said city tax.

Section 1 of article 8 of part 1 of the City and Village act contains the following proviso, to-wit: "The aggregate amount of taxes levied for any one year, exclusive of the amount levied for the payment of bonded indebtedness or interest thereon, shall not exceed the rate of two (2) per centum upon the aggregate valuation of all property within such city or village, subject to taxation therein, as the same was equalized for State and county taxes for the preceding year." (1 Starr & Curt. Ann. Stat. —2d ed.—p. 734).

If we understand the objection made by counsel for appellant, it is that the amount levied by the appropriation

ordinance of the city of Sullivan for the year 1898 exceeded the two per cent mentioned in the proviso above quoted. It is stipulated and agreed between the parties hereto, that the total assessed value of all the property within the city of Sullivan for the year 1897, upon which the assessment for the year 1898 was based, was \$224,938.00. Two per cent of this amount is \$4498.76. Section 1 of the ordinance in question ordains that the sum of \$5541.00, being the total amount of the appropriation theretofore made for corporate purposes for the city of Sullivan, and to be collected on the tax levy of the current fiscal year of said city, should be and the same was thereby levied and assessed, etc. As \$5541.00 exceeds \$4498.76, the levy is claimed to be excessive.

The ordinance in question contains the items, which go to make up the said sum of \$5541.00. Among these items is an item of \$1200.00 for "paving bonds and interest." If the item of \$1200.00 is deducted from the sum of \$5541.00, there remains \$4341.00, which is less than \$4498.76, the two per cent above mentioned. It will be noted, that the proviso above quoted states, that the aggregate amount of taxes, levied for any one year "exclusive of the amount levied for the payment of bonded indebtedness or interest thereon," shall not exceed the rate of two per cent, etc. The limit, prescribed by the statute, is two per cent after taking out the amount levied for the payment of bonded indebtedness and interest thereon. The item of \$1200.00 is for bonded indebtedness and interest. It is, therefore, proper to deduct that item, and, when such deduction is made, the remainder is within the limit prescribed by the statute. It appears that the city resorted to general taxation to pay for paving certain street intersections, and for ten per cent of the balance of the entire work in paving, and issued bonds in payment therefor. Cities are vested with power to make local improvements by general taxation, as well as by special assessment or by special taxation. It follows,

that the fourth objection, urged by the appellant in the court below, was without force, and that the county court committed no error in overruling it.

*Second*—Appellant's second objection, as made in the trial court, is that the school tax, levied by the board of education in the district of the city of Sullivan—being school district No. 1, township 13 north, range 5 east of the third principal meridian, in Moultrie county—as said tax is extended against appellant's property, is in excess of the amount allowed by law to the extent of \$192.21; and, therefore, appellant objects to the payment of \$192.21 of said school tax. In other words, the contention of appellant is, that the school tax, levied against its property, is, to the amount of \$192.21, in excess of the two per cent limit fixed by law upon the annual tax for school purposes.

Section 1 of article 8 of the School law of 1889 is as follows: "For the purpose of establishing and supporting free schools, for not less than five, nor more than nine months in each year, and defraying all the expenses of the same of every description; for the purpose of repairing and improving school houses, or procuring furniture, fuel, libraries and apparatus, and for all other necessary incidental expenses in each district, village or city, anything in any special charter to the contrary notwithstanding, the directors of such district, and the authorities of such village or city shall be authorized to levy a tax annually upon all the taxable property of the district, village or city, not to exceed two per cent for educational, and three per cent for building purposes, except to pay indebtedness contracted previous to the passage of this act; the valuation to be ascertained by the last assessment for State and county taxes." (3 Starr & Curt. Ann. Stat.—2d ed.—p. 3706).

Section 2 of article 8 provides as follows: "The directors of each district shall ascertain, as near as practicable, annually, how much money must be raised by

special tax for school purposes during the ensuing year, which amount shall be certified and returned to the township treasurer on or before the first Tuesday in August, annually. The certificate of the directors may be in the following form, viz.: We hereby certify that we require the sum of ..... dollars to be levied as a special tax for school purposes, and ..... dollars for building purposes, on the taxable property of our district, for the year A. D. ...." (Ibid. pp. 3706, 3707).

In the case at bar, the certificate of levy was made by the board of education of said school district as follows: "We hereby certify that we require the amount of five thousand (\$5000.00) dollars to be levied as a special tax for educational purposes, and six thousand (\$6000.00) dollars for building purposes, on the taxable property of our district, for the year 1898." It will thus be noted, that the certificate of levy certifies that the sum of \$5000.00 is required to be levied as a special tax for educational purposes. The amount, so to be levied for educational purposes upon all the taxable property of the district, must not exceed two per cent of the valuation to be ascertained by the last assessment for State and county taxes. It is stipulated and agreed between the parties here, that the total assessed value of all property in the said school district was \$257,598.00. Two per cent of this amount is \$5151.96. It thus appears that the \$5000.00 required by the certificate of levy, is less than two per cent of the total assessed value of all property in the district, and, therefore, is within the limit of two per cent fixed by section 1 of article 8.

But the certificate of levy further certifies, that \$6000.00 is required to be levied as a special tax for building purposes. The contention of appellant is, that at least \$3500.00 of this \$6000.00 is not really for building purposes, but for educational purposes; and that said sum of \$3500.00, being in excess of the two per cent limit fixed by the statute as the rate of taxation for educa-

tional purposes, is illegal. If this be so, then it follows that appellant is improperly taxed the sum of \$192.21, being the proportion of the alleged illegal excess, amounting to \$3500.00, which appellant is required to pay.

It certainly cannot be true, that the school board has the right to evade the law by levying a tax for school purposes in excess of the statutory limit of two per cent under the guise of a tax for building purposes. A tax for building purposes is one thing, and a tax for educational or school purposes is another; and, even if the two per cent, allowed as the amount of the tax for school purposes, is not sufficient, a greater amount cannot be raised by levying a further tax and calling it a tax for building purposes. If any portion of the \$6000.00, purporting to be levied for building purposes, is in fact for school purposes and to be used as such, then such portion of the \$6000.00 is improperly and illegally levied.

The real question, then, under this branch of the case, is whether the purposes, for which the tax of \$6000.00 has been levied, are educational purposes or building purposes.

In 1894 the people of said school district voted for the issuing of school bonds to the amount of \$10,000.00, each bond being for the sum of \$1000.00. The first two of these bonds were to become due in 1899. Twenty-five hundred dollars of the \$6000.00, required for building purposes, was to be applied to the payment of the principal of two of these school bonds falling due in 1899, and \$500.00 of interest upon the whole amount issued. It is not necessary for us to decide whether or not the sum of \$2500.00, included in the \$6000.00, and levied for the purpose of paying two of these school bonds and interest thereon, comes within the meaning of "building purposes," as used in the statute. It is sufficient for the purposes of this case to regard this \$2500.00 as being for "building purposes," because the appellant admits that this portion of the tax, amounting to \$2500.00, was prop-

erly levied, and it has paid its proportion of the tax which applies to this amount.

The balance of the \$6000.00, after taking out the sum of \$2500.00, was to be appropriated to the placing of a steam heating apparatus in the school building in place of the old one which had become useless, and to the re-construction of a part of the basement in the school building, which had become deficient and had been torn up, and to the making of a change in the system of draining the basement, and also to the construction of a stone walk around the school house. The objects, to which this balance of the \$6000.00, amounting to \$3500.00, was to be applied, come within the current ordinary expenses of the school, including ordinary repairs, and, as such, are covered by the taxes to be levied within the two per cent for educational purposes.

In the recent case of *O'Day v. People*, 171 Ill. 293, we held that the cost of building a small coal house, of painting and papering the school house, of lumber and flooring, of building a porch, of stoves and repairs on the same, and of fuel and janitor service, cannot be included in a tax levied for "building purposes," but must be included in the two per cent levied for "educational purposes." In *O'Day v. People, supra*, we said (p. 296): "In view of the previous legislation, and of the public policy of this State as indicated thereby, we have no doubt it was the intention of this statute that all of the current ordinary expenses of the schools, including ordinary repairs, were to be covered by the taxes to be levied within the two per cent for 'educational purposes,' and that the additional taxes to be levied within the additional three per cent for 'building purposes' were intended only to provide the means necessary to meet the special occasion of the building of a school house. The proper construction of this statute is that the words 'for building purposes' are special, and apply solely to the building of school houses and matters incident thereto, while the



words 'for educational purposes' are general, and apply to all matters for which a board of directors may levy school taxes. \* \* \* The words 'for school purposes' and 'for educational purposes,' as used in the preceding section, are synonymous. We are also led to this conclusion the more readily by reason of the fact that, when the law has given the power to levy a tax of two per cent, it has made a liberal provision for the support of the schools. It could hardly have been intended that, for such ordinary expenses as are shown in this case, school directors were to be clothed with the power of levying a tax up to five per cent of the value of the taxable property of the district. The constitution fixes the limitation on the indebtedness which the district may incur at five per cent. It never was the intention of the legislature by this statute to put it in the power of the school board to annually levy a tax for ordinary expenses equal to the total amount for which the district might in any event become indebted. The intention was to confine the directors, ordinarily, within the two per cent, but to clothe them with the additional power to make a larger levy in special cases, as in the case of the building of a school house." The purposes, to which the sum of \$3500.00, here sought to be raised under the name of a tax for building purposes, is to be applied, come within the class of repairs which, in the *O'Day case*, were held to be covered by the taxes levied within the two per cent limit for "educational purposes." Inasmuch, therefore, as at least \$3500.00 of the \$6000.00, levied for building purposes, was, as matter of fact, to be used for school purposes, that much of the tax levy of \$6000.00 is illegal. We are of the opinion, that the tax of \$192.21, levied upon the property of the appellant, was improperly levied for the reason above stated. A school board has no right to levy a building tax of \$6000.00 to be used for purposes, which come within the description of "educational purposes" according to the language of the statute. (*Town*

of *Aurora v. Chicago, Burlington and Quincy Railroad Co.* 119 Ill. 246).

In view of what has been said it is unnecessary to discuss the question, whether school taxes for building purposes can be levied without a vote of the people or not, inasmuch as the tax here objected to is illegal as being in excess of the statutory limit. (*O'Day v. People, supra*).

For the error in overruling the appellant's objection to the school tax levied against its property so far as said school tax included said sum of \$192.21, the judgment of the county court is reversed; and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

*Reversed and remanded.*

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CAROLINE KEPPEL *et al.*

v.

GUSTAV DREIER *et al.*

*Opinion filed October 19, 1900.*

1. BURNT RECORDS—*right of a cross-petitioner to prove seven years' possession—limitations.* In a proceeding to establish title under the Burnt Records act, a cross-petitioner may prove seven successive years' possession and payment of taxes under color of title where the facts relied upon are fully set out in his answer, even though the answer makes no reference to the Statute of Limitations.

2. COLOR OF TITLE—*notice of adverse claims is not bad faith.* Good faith in the acquirement of color of title does not require ignorance of adverse claims or of defects in the title.

WRIT OF ERROR to the Circuit Court of Cook county; the Hon. MURRAY F. TULEY, Judge, presiding.

GEORGE F. ORT, (MALCOLM A. CAMERON, of counsel,) for plaintiffs in error.

PINCKNEY, TATGE & ABBOTT, (LOUIS DANZIGER, of counsel,) for defendants in error.

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Mr. JUSTICE HAND delivered the opinion of the court:

On February 27, 1897, Caroline Keppel filed in the circuit court of Cook county a petition under the Burnt Records act to establish title to sub-lots 17 and 27 in the subdivision of lots 2, 3, 4 and 5, block 45, in the canal trustees' subdivision of the south-east quarter of section 21, township 39, north, range 14, east of the third principal meridian, Cook county, Illinois. A cross-petition by Gustav Dreier and Elizabeth Dreier, and answers and replications, having been filed, the case was tried and a decree entered finding Gustav Dreier to be the owner in fee simple of said premises, and Caroline Keppel and Rosina Noll have sued out this writ of error.

The petitioner, Caroline Keppel, claims title to said premises in fee simple, (subject to the dower therein of Rosina Noll, widow of Henry Noll, deceased,) by descent from Henry Noll, her father, who derived title to said premises on August 13, 1864, by warranty deed from Andrew Baier and wife and by *mesne* conveyance from the United States, Henry Noll having died intestate on February 25, 1867, leaving said Caroline Keppel (formerly Caroline Noll) him surviving as his sole and only heir-at-law. The cross-petitioner, Gustav Dreier, claims to be the absolute owner of said premises in fee simple as a purchaser thereof from Elizabeth Dreier, his wife, through Ferdinand Strassenburg, on September 6, 1879. On the trial of said cause it was conceded that the title to said lots 17 and 27 stood of record in the name of Henry Noll at the time of his death, February 25, 1867, and that he left him surviving Rosina Noll as his widow and Caroline Keppel (formerly Caroline Noll) as his sole and only heir-at-law.

On the trial of said cause the cross-petitioner, to establish and maintain title in himself, offered in evidence a warranty deed from Ferdinand Strassenburg bearing date September 6, 1879, conveying the premises in question to Gustav Dreier, which deed was duly acknowledged and recorded in the recorder's office of Cook

county, Illinois, on September 19, 1879, in book 946 of records, page 406; a warranty deed from Elizabeth Dreier (formerly Elizabeth Noll) and Gustav Dreier, her husband, bearing date September 6, 1879, conveying the premises in question to Ferdinand Strassenburg, which deed was duly acknowledged and recorded in the recorder's office of Cook county, Illinois, on September 19, 1879, in book 352 of records, page 319; a warranty deed from Barbara Noll bearing date August 4, 1874, conveying the premises in question to Elizabeth Noll, which deed was duly acknowledged and recorded in the recorder's office of Cook county, Illinois, on August 5, 1874, in book 386 of records, page 393; a deed from Benjamin D. Magruder, master in chancery of the superior court of Cook county, Illinois, bearing date August 23, 1873, conveying the premises in question to Barbara Noll, which deed was duly acknowledged and recorded in the recorder's office of Cook county, Illinois, on August 25, 1873, in book 239 of records, page 196, and which deed recites that the same is made pursuant to the decree of the superior court in case of *Noll v. Pollak et al.*; a certified copy of the record in the case of *Noll v. Pollak et al.*, consisting of a bill filed June 21, 1873; summons to Joseph Pollak, Henry H. Gage, William K. Wells, John Forsyth, Rosa Noll, Caroline Elizabeth Noll and all persons whom it may concern, with return thereon showing service upon Henry H. Gage, William K. Wells and John Forsyth; affidavit of non-residence of Rosa Noll and Caroline Elizabeth Noll; notice to Rosa Noll and Caroline Elizabeth Noll, together with certificate of publication of such notice filed April 24, 1873; order of default of Caroline Elizabeth Noll, Rosa Noll and others; order of reference entered August 5, 1873; master's report and testimony filed August 21, 1873, and decree of the court in that case entered August 21, 1873; also, tax receipts showing the payment of all taxes on said premises for the years 1879 to 1896, inclusive, by Gustav Dreier, for the years 1874 to 1878, inclusive, by

Elizabeth Noll, and for the year 1873 by Barbara Noll; also, testimony tending to show that Gustav Dreier had been in possession of said premises from September 6, 1879, down to the time of the filing of the petition herein, that Elizabeth Noll had been in possession thereof from August 4, 1874, down to September 6, 1879, and Barbara Noll from the time of the death of Henry Noll to August 4, 1874.

The case of *Noll v. Pollak et al.* involved the title to these lots, and the plaintiffs in error were parties defendant thereto. The decree entered in said cause on August 21, 1873, established a fee simple title to said lots in Barbara Noll, a remote grantor of Gustav Dreier. If the court had jurisdiction the decree in that case is conclusive between the parties to this suit. It is claimed by plaintiffs in error that the court did not have jurisdiction and that said decree is void.

Gustav Dreier, for the purpose of establishing his title and ownership, read in evidence and relied upon the deed from Ferdinand Strassenburg bearing date September 6, 1879, as color of title, and made proof of seven years' possession and payment of taxes under such deed. If the proof shows that Gustav Dreier had been in the actual and continued possession of said premises under claim and color of title made in good faith for seven successive years, and during all that time had paid all taxes legally assessed thereon, it becomes wholly immaterial whether the proceedings in *Noll v. Pollak et al.* conformed to the law or not. "Every person in the actual possession of lands or tenements, under claim and color of title, made in good faith, and who shall, for seven successive years, continue in such possession, and shall also, during said time, pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title." Hurd's Stat. 1897, chap. 83, sec. 6, p. 1048.

It clearly appears from the record in this case that Gustav Dreier took possession of said lots 17 and 27 on September 6, 1879, under the deed from Ferdinand Strasenburg. The two lots were in fact one piece of land with two frontages, with a house on each frontage. Gustav Dreier lived in one house and rented the other, collecting the rents himself. He continued in such possession from September 6, 1879, until the time of the bringing of this suit. He paid all taxes legally assessed thereon during that time and claimed to be the owner thereof.

It is contended, however, by plaintiffs in error, that the defendant did not plead this statute, and therefore is precluded from relying on that defense. While it may be true he made no reference in his answer to this particular statute, he did set out in full the facts upon which he relied as a defense, and the proof upon the hearing fully sustained the same. This was sufficient. In the case of *Coward v. Coward*, 148 Ill. 268, the court say (p. 274): "Conceding that the deed from Folts to Matilda Coward did not pass a paramount title, yet that deed purporting to convey the lot to her, under the uniform ruling of this court was color of title, and seven successive years' possession and payment of taxes under color of title is a bar to a recovery in an action instituted by the party holding the paramount title, unless such person is under disability, which is not the case here. But it is said in the argument that the defendant has not pleaded *laches* or the Statute of Limitations, and hence she is precluded from relying on that defense. The defendant is not relying on the *laches* of the complainant or a statute of limitations which may be pleaded in bar of an action. That is not her position, as we understand the record. The complainant claims to be the owner of the lot in controversy and seeks to set aside two deeds under which defendant claims title. The defendant, on the other hand, claims to be the absolute owner of the lot, and for the purpose of establishing her title and ownership she read in evi-

dence a deed from Folts to herself, which is color of title, and makes proof of seven years' possession and payment of taxes under such color of title, which, under the law, establishes title in herself. Under the act of 1839, where the right of entry and right of action are lost by operation of the statute, the party in possession is conclusively presumed to be the owner. (*Faloon v. Simshauser*, 130 Ill. 649.) Where the bar of the statute has become absolute, as in this case, and the party entitled to hold the land is in possession, the title acquired and held under the Statute of Limitations is as available for attack as defense, and it may be asserted against all persons claiming the land. (*Hale v. Gladfelder*, 52 Ill. 91; *McDuffee v. Sinnott*, 119 id. 449; *Gage v. Hampton*, 127 id. 87.) The defendant had the right to prove that she was the owner of the property and held an absolute title. Whether that title was derived under the Limitation act of 1839, or whether she acquired and held title in some other manner, was a matter of no consequence to the complainant,—in other words, it was her right to establish title in any manner she could. In an action at law, where the defendant relies on title acquired and held under the limitation laws of the State, he is not required to plead the limitation laws in order that he may establish, by proof, his title on trial, and we are aware of no well settled rule which requires a defendant to plead the limitation laws to enable him to establish title thereunder in a suit in equity."

It is further contended by plaintiffs in error the defendant did not acquire his title in good faith. The court, in the case already referred to, on page 275 say: "But it is said the defendant did not acquire title in good faith. There is good faith where there is no fraud and the color of title is not acquired in bad faith. (*McConnel v. Street*, 17 Ill. 253; *Stubblefield v. Borders*, 92 id. 279.) Good faith in the acquirement of title, within the meaning of the statute, does not require ignorance of adverse claims or defects in the title. Notice, actual or constructive, is

of no consequence. (*Chickering v. Failes*, 26 Ill. 507; *Dickenson v. Breeden*, 30 id. 279; *McCagg v. Heacock*, 34 id. 476; *Coleman v. Billings*, 89 id. 183; *Piatt County v. Goodell*, 97 id. 84.) There may be good faith notwithstanding actual notice of existing claims or liens, or knowledge of legal defects which prevent the title of which there is color, from being absolute.—*McCagg v. Heacock, supra*; *Brian v. Melton*, 125 Ill. 647." There is no evidence in this record which shows that the defendant acquired title in bad faith. The deed which he held from Strassenburg purported on its face to convey to him title. He was guilty of no fraud in procuring it. He believed his deed passed to him the title, and we think he acquired title to said premises under said deed in good faith. *Coward v. Coward, supra*.

The decree of the circuit court will be affirmed.

*Decree affirmed.*

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AUGUSTUS N. EDDY *et al.* Exrs.

v.

THE PEOPLE, for use, etc.

*Opinion filed October 19, 1900.*

1. PROBATE—*interest on claim and judgment is of the same class as the claim.* Interest accruing before the allowance of a claim against an estate and the statutory interest accruing after the claim is allowed are a mere incident of the claim itself, and the claimant is entitled to preferential payment in full before claims of a lower class are paid.

2. BONDS—*when sureties on executor's bond are released as to accrued interest.* Sureties on a deceased executor's bond are released as to accrued interest upon a judgment against the executor's estate, where there were sufficient funds to pay the judgment and interest, but not enough to pay the claims of the next class in full, and the claimant, without notice to the sureties, expressly waived preferential payment of such interest and accepted the amount of the judgment alone, consenting that the balance of the estate be distributed on claims of the next class.

*Eddy v. People, for use*, 88 Ill. App. 265, reversed.



APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOHN BARTON PAYNE, Judge, presiding.

HOLT, WHEELER & SIDLEY, for appellants.

THORNTON & CHANCELLOR, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Edwin Bean was executor of the will of John H. Hooper, deceased, and Franklin F. Spencer was one of the sureties on his bond as such executor. Bean and Spencer died. Appellants, Augustus N. Eddy and Arthur J. Caton, are executors of the will of Spencer, and appellee, Charles S. Bloch, is administrator *de bonis non* of the estate of Hooper. Appellee brought this suit in the superior court against appellants on said bond, and alleged as breaches that the deceased executor, Bean, did not make a proper inventory of the Hooper estate, and that he misapplied and converted certain sums of money belonging to that estate. A jury was waived and the cause was tried by the court. At the trial the demand of the plaintiff was for interest upon a claim of \$5942.57 allowed in favor of the plaintiff as a preferred claim of the sixth class against the estate of Bean in the probate court of Cook county. The claim was allowed in 1891 and the principal was paid in 1897, leaving the accrued interest unpaid, which plaintiff claimed in this suit. The defense made was, that the administrator of the Bean estate had funds sufficient to pay in full the said claim and interest from the time of its allowance and leave a balance for a part payment of claims of the seventh class; that the plaintiff was entitled to such payment in full, but waived all claim to the payment of interest on his judgment as a preferred claim of the sixth

class and consented to a distribution of said funds to holders of claims of the seventh class, and that by waiving a preferential claim to the interest and consenting to the distribution of that amount among the seventh-class creditors the sureties of Bean were released. The court found for plaintiff and assessed his damages at \$1474.20. The Branch Appellate Court for the First District affirmed the judgment.

The evidence proved the following facts: On February 12, 1890, Edwin Bean was appointed executor of the will of John H. Hooper, deceased, and he died October 7, 1890, without having filed an inventory. Plaintiff was appointed administrator *de bonis non* of the estate of Hooper, and filed a claim against the Bean estate in the probate court for the balance due the Hooper estate. The claim, being for trust funds, was allowed as of the sixth class October 22, 1891, for the sum of \$5942.57. Other claims were allowed against the Bean estate, among them being a considerable number and amount of the seventh class. In July, 1892, plaintiff brought this suit on the bond, but nothing was done with it until after a final settlement of the Bean estate. In April, 1897, a final account was filed in the Bean estate, showing all claims paid except this sixth-class claim and various seventh-class claims. There was more cash than would be required to pay this claim in full, with all interest, but not enough to pay in full all seventh-class claims. There was some discussion between plaintiff's attorney and those representing claims of the seventh class as to whether the interest on plaintiff's claim was preferred as well as the principal, but the question was not submitted to the court and plaintiff waived all right to receive payment of the interest as a preferred claim of the sixth class and consented to receive the principal, and that the remainder of the estate, amounting to \$3850.46, should be distributed among holders of claims of the seventh class.

The defendants asked the court to hold as law, by propositions submitted for that purpose, in substance, that the interest on the judgment against the estate of Bean was a part of the judgment and entitled to payment equally and in the same class with the principal, and that the waiver of all right to the interest as a preferred claim operated to discharge the sureties, but the court refused to hold such propositions.

Counsel for both parties say that the court deducted from the plaintiff's claim \$160 as the *pro rata* share which he would have received if he had taken said share of such interest as a part of the seventh-class claims. In other words, they say that the interest on the claim amounted to \$1600 and the distribution among seventh-class claimants was about ten per cent, and if the plaintiff had taken a distributive share of the interest as a seventh-class claimant he would have received about \$160, and the court held that the sureties were released to that extent.

The protection which the statute gave to the claim for money received in trust by Bean, as executor of the will of Hooper, extended to the interest upon such money equally with the principal. The object of the statute is to classify debts or claims according to their quality, and the claim embraces the interest on it as well as the principal. If interest should accrue upon moneys received in trust before the allowance of the claim, it would be merged in the judgment and be an integral part of it, and the interest accruing afterward is the statutory allowance for non-payment. In either case it is a mere incident of the principal thing, attaching to it and not separable from it for the purpose of classification. Plaintiff's judgment against the Bean estate drew interest at the statutory rate, (*Mitchell v. Mayo*, 16 Ill. 83,) and the statute required the administrator to pay the claims according to their respective classes, commencing with the first class. There was sufficient money to pay the total

amount of plaintiff's claim, principal and interest, and he was entitled to receive it before anything should be paid upon claims of the seventh class.

The Bean estate was in the course of administration under the control of the probate court, and the plaintiff had established a preferential right in that court to the amount of his claim. Without consulting the defendants or notifying them, he withdrew and surrendered his preference,—not through any decision or judgment of the court, but upon his own motion. It is a well settled principle that any act of the obligee inconsistent with the rights of the surety releases the latter to the extent of the injury occasioned by such act, and if the obligee has a pledge or security for the debt and parts with it without the knowledge of the surety he releases the surety to the amount of the property surrendered. If he has the means of satisfaction in his hands and voluntarily surrenders it he thereby discharges the surety to the extent of such means. (*Rogers v. School Trustees*, 46 Ill. 428; *Kirkpatrick v. Howk*, 80 id. 122; *Holmes v. Williams*, 177 id. 386.) Of course, the fact that some seventh-class creditors objected to the payment of interest as preferred would afford no justification for a waiver or release of the claim,—at least without submitting the question to the decision or judgment of the court. It must be assumed that the probate court would have applied the statute and the plaintiff's claim would have been paid in full if he had not expressly waived the interest as he did. Plaintiff had a right to the fund to the extent of his entire claim, and distribution could not have been made except by paying him in full in the absence of his waiver. There is no more reason for holding the sureties for the interest than there would have been for the principal if the plaintiff had consented that the principal also should be paid to seventh-class claimants. It is true that this suit had been brought and had been pending for some time, and, as counsel say, it operated as a

continuous demand for the whole sum due from the time the summons was served; but we do not see how that affects in any way the question whether the plaintiff could release, to the injury of the sureties, a fund against which he had established a claim. The relations of the parties were not altered in any respect by the pendency of this suit. Defendants remained sureties as they were before, and if plaintiff would have been otherwise bound to not release the assets of the Bean estate he was equally bound although his suit was pending. It is also true that the plaintiff might pursue the remedies afforded by the law, both against the estate and the sureties, until he obtained satisfaction. The contract of the sureties was a primary obligation, and they were bound equally and absolutely with the principal, but at the same time they had a right that the plaintiff should not be guilty of any act prejudicial to their rights by surrendering the means of satisfaction already acquired. The sureties would have had a right to discharge the obligation and be subrogated to the claim against Bean's estate; but this claim had been allowed as of the sixth class, and there was money enough to pay it in full, both principal and interest, and we see no reason why they should be required to assume that their rights would be endangered or lost by any act of the plaintiff if they did not make such payment.

We are led to the conclusion that plaintiff's waiver of his right to the interest sued for, and his consent that it should be paid to the seventh-class creditors, would operate in law to discharge the sureties as to such interest, and the trial court was in error in refusing to hold the propositions of law submitted and the Appellate Court erred in affirming the judgment.

The judgments of the Appellate Court and the superior court of Cook county are reversed and the cause is remanded to the superior court.

*Reversed and remanded.*

THOMAS FRAIL

v.

MARGARET CARSTAIRS *et al.**Opinion filed October 19, 1900.*

1. **WILLS**—*effect where devisee dies before testator.* Under section 11 of the act on descent, (Rev. Stat. 1874, p. 419,) whenever a devisee, being a child or grandchild of the testator, dies without issue, before the testator, and the will makes no provision for such contingency, the estate so devised is to be treated as intestate property.

2. **SAME**—*devise construed as creating a determinable fee.* A devise to the testator's children of property to be used for a home for the unmarried ones, conditioned that neither should encumber the property or sell it except to a brother or sister, and with a limitation over, as to the shares of the unmarried children, to the survivor of them in case the others died unmarried, creates a determinable fee, and upon the death of one unmarried child before the death of the testator his interest passes as intestate property, in the absence of a contrary provision of the will.

3. **SAME**—*word "unmarried," in its usual sense, means never having been married.* The word "unmarried," in its usual sense, means never having been married, although the circumstances may show that said term, as used in a bequest of real estate as a home for the testator's "unmarried children," means not having a husband or wife living at the time of death.

APPEAL from the Circuit Court of Stark county; the Hon. L. D. PUTERBAUGH, Judge, presiding.

M. SHALLENBERGER, and V. G. FULLER, for appellant.

ALLEN P. MILLER, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Barnabas Frail, being the owner of the south-east quarter of section 26, township 13, range 5, in Stark county, died in the year 1893, leaving a last will and testament devising the same. The will, except the formal parts, is as follows:

*"Second*—I give to my sons, James and Thomas Frail, and my daughters, Kate and Margaret Frail, jointly, the south one hundred acres of the south-east quarter of section numbered 26, in township numbered 13, north of the base line, and in range numbered 5, east of the fourth principal meridian, in the county of Stark and State of Illinois, for a home for my unmarried children, and that neither one shall ever give any mortgage or other lien to encumber the same, nor shall either one ever sell the same, or any part thereof, except to a brother or sister or to a child of a brother or sister. And to Susanna Jackson, (wife of John Jackson,) Mary E. Bevier, John Frail and Sarah J. Graves, (wife of John Graves,) the north sixty acres of the quarter section of land above described, to be held by them jointly, never to be encumbered by mortgage or otherwise, and never to be sold by either one, or any part thereof, except to a brother or sister or the child of a brother or sister, each to enjoy one-fourth of the rent thereof.

*"Third*—It is my will that the household and kitchen furniture remain in the home for the use of those who occupy it; that the farming implements that are necessary remain on the place as they may be at my death; the balance of the personal property to be sold in a reasonable time by my executors or the survivors of them, at public sale, giving a credit of twelve months on such terms as they may deem best for the interest of all concerned, the money when collected to be paid to my children equally, and to be all closed up within fifteen months after said sale, if it can be done without loss

*"Fourth*—It is my will that the debts and funeral expenses mentioned herein shall be borne by those to whom I gave the one hundred acres mentioned herein.

*"Fifth*—These bequests to be in full for all labor and money expended, previous to my death, on said premises, or for me or for my care in any manner.

*"Sixth*—It is my will that Thomas Frail pay to his brother and the two sisters owning jointly with him the south one hundred acres mentioned herein, a yearly rent of \$200 for the use of said land, and to keep up the fences and pay the taxes thereon, and to allow them pasture and feed for two cows and one horse, and the house, garden, out-houses, yards, barn, stabling, etc., and grounds as at present located or located at my death, except that Thomas shall have the use of such stabling that is not wanted.

*"Seventh*—It is my will that if either James, Kate or Margaret Frail shall die unmarried, their share shall go to the survivor or survivors of them; and it is my further will that at the death of all these parties named in this article dying unmarried, their interests shall all go to my son Thomas Frail, his heirs and assigns forever."

James Frail, one of the sons mentioned in the will, died in 1891, in the lifetime of his father. The daughter Margaret was married in 1894 to David Carstairs, and is one of the appellees. Kate never was married, and died in 1896. Said Margaret Carstairs bought the interests of John Frail and Mary E. Bevier in the north sixty acres, and with her husband, David Carstairs, filed the bill in this case for a partition of said one hundred and sixty acres. The north sixty acres was devised to four of the children, and there is no disagreement concerning that tract. There was a contest between the appellant, Thomas Frail, and the appellee Margaret Carstairs, as to the south one hundred acres. The cause was heard on exceptions to the master's report, and a decree was entered finding that the appellee Margaret Carstairs was the owner in fee simple of one-fourth of said south one hundred acres as directly devised to her, and owner of the shares of James and Kate as survivor of them. The land was partitioned in accordance with the decree, giving three-fourths of the one hundred acres in fee simple to Margaret Carstairs and one-fourth to Thomas Frail.



From the decree confirming said partition Thomas Frail perfected his appeal.

James Frail, one of the devisees, died, leaving no issue, before his father, Barnabas Frail, and the estate devised to him by the will did not vest. Our statute provides for such case, as follows: "Whenever a devisee or legatee in any last will and testament, being a child or grandchild of the testator, shall die before such testator, and no provision shall be made for such contingency, the issue, if any there be, of such devisee or legatee, shall take the estate devised or bequeathed as the devisee or legatee would have done had he survived the testator, and if there be no such issue at the time of the death of such testator, the estate disposed of by such devise or legacy shall be considered and treated in all respects as intestate estate." (Rev. Stat. chap. 39, sec. 11.) Appellees say that the interest devised to James Frail was only a provision to give him a home and support for such time as he continued to live on the estate and remained unmarried, or that the devise was of a life estate to three children with a contingent remainder to the survivor, and that it was not such an estate as would descend as intestate estate. The devise to James was not a mere provision for occupancy and support while unmarried, nor a mere devise of a life estate, since the limitation over was to take effect only upon the event of one of the devisees dying unmarried. By the seventh clause of the will it was only upon the happening of the doubtful and uncertain event of the death of either James, Kate or Margaret unmarried that the share of either should go to the survivor or survivors of them, and upon the death of all said parties unmarried all their shares were to go to Thomas Frail in fee. The estate devised was not reduced to a life estate by that provision, but it remained a fee, for the reason that it might and would continue forever unless the contingency upon which the limitation over was to take effect should occur. While it was a fee,

it was made determinable upon the happening of a certain event. As James left no issue and no provision was made for the contingency of his death before the testator, the statute applies, and the interest devised to him descended as intestate estate. The devise of an undivided one-fourth to James, with all its conditions and limitations, lapsed by his death, and that interest went to the heirs-at-law exactly as if the devise had not been made. All of the heirs were therefore necessary parties and were entitled to their respective interests in said share, but they were not all made parties and were not before the court.

The intention of the testator as declared in his will is to be carried into effect unless prevented by some rule of law, and it is not contended that there is any such rule in this case. The validity of the various provisions of the will is conceded, and the court is merely called upon to ascertain and carry into effect the intention of the testator. So far as the will became effective, it devised one-fourth of the one hundred acres to Thomas Frail without limitation, and one-fourth each to Kate and Margaret with a limitation over to the survivor in the event of the death of either of them unmarried, and in the event of the death of both unmarried, to said Thomas Frail. At the death of Kate her share devised by the will vested in Margaret, as survivor. Kate also inherited an interest in the share devised to James, which passed as intestate estate, and this interest went to her heirs-at-law.

It is argued in behalf of appellant that there could be no partition during the lifetime of the appellee Margaret Carstairs, because if she should not be married at her death, he would take the fee in the one-half now vested in her. Margaret is married and has a child, but it is contended that if her husband should die before her and she should not marry again, she would die unmarried, within the meaning of the will. The original and usual meaning of the word "unmarried" is never having been mar-

ried, but circumstances may show that it is used in the sense of not having a husband or wife living at the time of death. (*Peters v. Balke*, 170 Ill. 304.) When the will was made, James, Kate and Margaret were living with the testator. Kate and Margaret had never been married. James was a childless widower and his wife had been dead for twenty-eight years. Undoubtedly, the testator used the word with-reference to James in the sense of not then having a wife. The provision of the will for a home for the unmarried children and the use of the premises undoubtedly referred to those who should remain as they were when the will was made and not contract a future marriage, and if one should be married that one would lose the benefit of the home provided for. Taking the provisions of the will and the circumstances together, we think the testator referred to a future marriage. Margaret was married and is no longer within the description of the children for whom the premises were to be maintained as a home. The provision for a home has come to an end, and it would be an unnatural construction of the will to hold that if David Carstairs should die Margaret would again become entitled to the home as unmarried or that her interest should go to Thomas. The contingency of her dying unmarried, as meant by the testator, has become impossible.

We conclude from the will that one-fourth of the fee to the one hundred acres is vested in the appellant, Thomas Frail, one-half in the appellee Margaret Carstairs, and the remaining one-fourth in the heirs-at-law of the testator. The conclusion of the circuit court as to the share devised to James was different, and therefore the decree must be reversed.

The decree is reversed and the cause remanded.

*Reversed and remanded.*

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY  
v.

MICHAEL J. MORAN.

*Opinion filed October 19, 1900.*

1. **MECHANICS' LIENS**—*when sub-contract will be regarded as completed.* A sub-contract for the construction of railroad masonry is not completed, as respects the running of the time for serving notice of lien, until the work is done, even though the railroad company, by arrangement, finishes the latter part of the work, where the sub-contractor, under such agreement, is still required to furnish and prepare the stone for laying and is held responsible for the quantity and cutting of the same, the only work assumed by the company being the laying thereof.

2. **ESTOPPEL**—*when a railroad company is estopped to repudiate oral agreement.* A railroad company which has received the benefit of an oral agreement, made between its engineer, as its representative, and a sub-contractor on masonry work, which fixes the additional price to be allowed the latter for cutting stone which the engineer directed should be substituted for that called for in the contract, is estopped to repudiate such agreement after the sub-contractor has fully acted thereon.

3. **WAIVER**—*provision in contract requiring written consent to change may be waived.* A provision in a written contract for railroad masonry that no stone other than that specified in the contract should be used without the written consent of the company's engineer, must be deemed waived where the engineer not only consented orally but directed the substitution of other stone, which was accepted and used by the company.

4. **CONTRACTS**—*when provision for settling disputes does not apply.* A provision in a written contract for railroad masonry that the decision of the company's engineer shall be conclusive of all disputes relative to the contract does not apply as to extra work and materials different from those specified in the written contract.

*C. & E. I. R. R. Co. v. Moran*, 85 Ill. App. 543, affirmed.

**APPEAL** from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. E. F. DUNNE, Judge, presiding.

W. H. LYFORD, and S. A. LYNDE, for appellant.

FRANK O. LOWDEN, HENRY D. ESTABROOK, and HERBERT J. DAVIS, for appellee.

Per CURIAM: In affirming the decree in this case the following statement was made and opinion rendered by the Branch Appellate Court:

"This is a petition for a mechanic's lien under the Railroad Lien statute, against appellant and one Chapman, as original contractor.

"In April, 1892, appellant entered into a contract with Chapman for the construction of about forty-six miles of track between Danville and Momence, Illinois. Four days thereafter Chapman entered into a contract with Moran, the appellee, sub-letting to the latter a portion of the work. The sub-contract was identical with the main contract in reference to the masonry, and after providing that the rate should be for 'first-class bridge masonry, \$8.50 per cubic yard,' contains the following: 'It is understood by the parties hereto that the foregoing prices of masonry are based upon the following agreement of the parties as to cost of and freight rates on stone to be used therein, to-wit: That the necessary stone for said masonry can be secured from quarries at Williamsport and Independence, Indiana, at three dollars (\$3) per cubic yard, and that the freight rate on such stone from the quarries to the work will be fifty cents per ton. If the party of the first part is obliged to secure stone from quarries other than those mentioned above, and from such other quarries the rough stone costs more than three dollars (\$3) per cubic yard, the party of the second part will pay the difference between three dollars (\$3) per cubic yard and the cost of such stone, but no stone shall be secured from such other quarries without the written consent of the engineer of the second party. If the freight rate on stone secured from other quarries than those mentioned above is more than fifty cents per ton, the second party will pay, in addition to the prices above named,

the excess of such freight rate above fifty cents per ton. If, on the other hand, other quarries are found from which the first party can secure satisfactory stone on which the freight rate from the quarries to the work is less than fifty cents per ton, the second party shall deduct such difference in freight rates on stone from the prices above named.'

"It appears from the evidence that sandstone was the only kind of stone obtainable at these Indiana quarries, but, as appellant's counsel states, it was found that stone from these quarries was unsatisfactory and other stone had to be used. Thereupon Moran, Chapman and one Baldwin, the chief engineer of the appellant company, got together in Baldwin's office to discuss this stone question. Moran was finally directed by Chapman and Baldwin to procure stone from a Joliet quarry, and it was agreed that Moran should receive one dollar extra per yard for cutting the Joliet limestone over what he was to have received for the Indiana sandstone, and sixty-five cents a yard to cover the difference in the price of the Joliet over the Indiana stone.

"In the latter part of November, 1892, there still remained a comparatively small amount of work to complete appellee's contract. This was the erection of the parapet walls of two bridges which had been delayed, because when appellee was ready the railroad company was not ready, and afterward, for some reason, it was not convenient for appellee to proceed at the time when the company was ready to permit the work to go on. Because of this mutual inconvenience an arrangement was made between Moran and the appellant company, with the consent of Chapman, whereby appellant agreed to complete the wall itself, using the stone which had been cut and provided for the purpose by appellee. For thus setting the stone in and erecting the parapet walls, appellee was to be charged by appellant \$3 a cubic yard. Appellee testifies that he wanted the company to take

the completion of this wall altogether off his hands and enable him to get rid of the work, and that this, Baldwin, the chief engineer of appellant, refused to do. He says that as the arrangement was made he was still to be accountable for the stone in that parapet wall, and responsible for any that was missing or a misfit, until the completion of the work. The railroad company was to do only the mechanical work, and Moran was still to furnish the material, just as he would have done if he had with his own men laid the stone in the wall. He had already prepared the stone, and it was there upon the ground. He did no work himself and furnished no new material after December 1, 1892.

"The railroad company completed the erection of the wall under its contract with appellee about the middle of December, and on the 17th settled in full with Chapman. The latter stated his indebtedness under his contract with appellee to be \$7582.06. Without verifying this statement by inquiry of Moran, appellant settled with Chapman on that basis, retaining the amount which Chapman thus conceded to be due appellee, to be delivered to the latter upon the condition imposed by Chapman that Moran should sign a receipt in full and a release discharging both Chapman and appellant from all further liability to Moran growing out of the said contract. Moran refused to sign such a release, and on December 27 served a notice of lien upon the president of the railroad company. Upon the hearing of the petition the circuit court decreed that appellee was entitled to the lien and to the extra price as agreed upon for cutting the Joliet stone. The contractor, Chapman, abandoned the case, apparently, pending the hearing in the trial court, and the railroad company brings the case here on appeal."

Opinion:

"It is first contended by appellant that the notice and copy of contract required to be served in accordance with the Railroad Lien act (Rev. Stat. chap. 82, sec. 9,) were

not served upon appellant within twenty days after the completion by appellee of the work under his sub-contract with Chapman. It is contended that the arrangement made, with Chapman's consent, between appellee and appellant, about November 23, 1892, in accordance with which appellant completed the parapet walls for Moran, operated as a termination and completion, at that date, of the sub-contract between appellee and Chapman. The railroad company finished the work about the middle of December. The notice required to maintain appellee's lien was served upon appellant December 27, and within the time required by statute, if it be considered that appellee's sub-contract with Chapman was not completed until the appellant company finished, under its agreement with appellee, the construction of the parapet walls which were included within said sub-contract. If, on the other hand, the arrangement between appellant and appellee, made about November 23 previous, operated as a completion of appellee's sub-contract, because appellant agreed to finish the work itself with the material already furnished by appellee, then the notice served December 27 following was not served within twenty days of the completion of the sub-contract.

"There is no controversy 'as to the dates, facts and circumstances of this transaction,' as appellant's counsel concede. It is manifest that while Moran did not do any actual work under the sub-contract with Chapman after the arrangement of November 23, or thereabouts, was made with the appellant company, still the work itself, as required by said sub-contract, was not done until finished by appellant, about December 14. Appellee's contract with Chapman was not *completed* until that date. It is evident, also, that his responsibility for a portion of the work, at least, did not cease until that date. According to evidence introduced in behalf of appellant, appellee was allowed for the material and the cutting of the stone composing the wall. All that the appellant



company undertook was to lay the stone furnished by Moran in place,—that is, erect the wall; and in making the arrangement as to price, Moran allowed and the appellant company was to receive,—deducting it from what, under the sub-contract, Moran was otherwise entitled to,—\$3 a cubic yard *for setting the stone*. No arrangement was made that appellant should supply or cut or re-cut any stone in case of any deficiency or defect or misfit. It does not appear even that any investigation was made by appellant of the quantity or quality or condition of the stone. The company merely agreed to set it in place, and all the other work and material agreed to be furnished by Moran under his sub-contract with Chapman he was still liable for until the whole was completed. He was not released from his contract by the arrangement with appellant, and his liability thereunder did not end until the stone he agreed to and did furnish was actually in place and the parapet walls completed. This was not until about December 14, and his notice of lien was served December 27, within twenty days of the completion of the sub-contract.

“There are other considerations which lead to the same conclusion. The railroad company clearly, under the arrangement with Moran, would not have been obliged to settle with Chapman, the original contractor, and pay him for the work Moran was to do, until it was actually done, and it was thus ascertained that the stone Moran was furnishing was sufficient in quantity, and in all other respects to comply with the contract. Appellant did not, in fact, settle with Chapman until December 19,—four days after the completion of the parapet walls,—as required by the contracts. When it did thus settle, Chapman admitted indebtedness to Moran, and the appellant accepted his statement of the amount of that indebtedness without verifying its correctness, when, according to its own answer, it might have been put upon its guard by the condition which Chapman exacted to be complied

with before Moran should be paid what Chapman admitted was due him, viz., that he should sign a receipt in full and a release of both Chapman and appellant from further liability.

"It is urged that the circuit court erred in overruling certain exceptions to the master's report. These refer to an extra allowance to Moran for cutting 3548.8 yards of Joliet stone at one dollar per yard, and to the allowance of interest. The real contention is as to the allowance of anything extra for cutting the Joliet stone. It is conceded that a verbal agreement was made between Moran, Chapman and one Baldwin, representing appellant as its chief engineer, that Moran should receive this one dollar per cubic yard for the 3548.8 cubic yards of stone for which the allowance complained of was made. Appellant's contention is that this verbal agreement is in contravention of the written contract between Moran and Chapman, and therefore void. It is not denied that Moran proceeded under the agreement in good faith to furnish, and did furnish and cut, this quantity of Joliet limestone. We perceive no reason why the railroad company could not agree, if it desired that Joliet limestone should be used instead of the Indiana sandstone called for by the contract, to pay Chapman, for Moran, the excess or supposed excess in cost of the former stone over the latter, nor why appellant could not make an explicit and binding agreement to pay the extra dollar per cubic yard in consideration of getting the Joliet stone.

"It is urged, however, that the contract in writing between Chapman and appellee contemplated this very contingency that it might become necessary to use other stone than that described therein, and provided just what extra compensation should be paid in such case, whether for Joliet or any other stone, and that no more can be recovered, notwithstanding the new verbal agreement. The sub-contract contains a provision that if Moran 'is obliged to secure stone from quarries other than those

mentioned above, and from such other quarries the rough stone costs more than \$3 per cubic yard, the party of the second part (Chapman) will pay the difference between \$3 per cubic yard and the cost of such stone. But no stone shall be secured from such other quarries without the written consent of the engineer of the second part.' The contract expressly distinguishes between the 'cost of and freight rates on stone.' While the charge for freight in case stone was procured from other quarries was specified in the contract, the difference in cost of such stone was not thereby expressly fixed. It was left to be ascertained when the contingency should arise.

"It would appear that the use of Joliet limestone, involving extra expense in cutting over Indiana sandstone, was a contingency not contemplated when the contracts were drawn. This is indicated by the conduct of the parties. When the question arose, appellant's chief engineer did not claim that appellee could be compelled to use Joliet stone under the contract. Such an idea seems not to have been suggested. We think it clear the parties themselves so construed the contract, and regarded the extra expense of cutting the Joliet limestone, over the Indiana stone, as not covered by the contract and to be provided for by a new agreement,—else why was such new agreement made? It was made, and appellee in good faith furnished and cut the more expensive stone thereunder. Appellant received the benefit. The agreement having been executed, an equitable estoppel certainly arises in Moran's favor, and appellant cannot now be allowed to repudiate its own act by which appellee was led into a line of conduct prejudicial to himself. *Worrell v. Forsyth*, 141 Ill. 22, and cases there cited.

"Nor do we regard this conclusion as in any way affected by the provision of the contract relied upon by appellant, as follows: 'The following are the full rates upon which this agreement is based, viz.: First-class bridge masonry, \$8.50 per cubic yard.' This provision

of paragraph 7 of the contract is immediately followed by the portion of the contract wherein Chapman agreed to pay the difference in cost in case Moran was obliged to procure rough stone from 'other quarries,' costing more than the Indiana stone. This difference was to be over and above the 'full rates,' as stated in said paragraph 7, and it appears to have been so treated by the parties. The witness Dawley stated that sixty-five cents extra per cubic yard was allowed Chapman therefor by appellant. This difference was due Moran from Chapman under the sub-contract, and its correctness is not disputed. But it is over and above the original 'full rates' of \$8.50 per yard provided by the contract for first-class bridge masonry, and shows the construction of that clause by the parties themselves, viz., that under certain conditions that price for the masonry was not to be the full rate.

"We do not regard the authorities cited by appellant's counsel to show that 'a written, sealed, executory contract cannot be modified by a parol agreement,' as in point under the facts.

"The objection is made that there was no consent *in writing* by Baldwin, appellant's engineer, for use of the Joliet stone. It is conceded he did consent, and he not only consented for the railroad company, but desired and directed it to be substituted for the Indiana stone. It was so substituted, and was accepted and used by the appellant. The objection is purely technical. The *written* consent must be deemed to have been waived by appellant's conduct. *City of Elgin v. Joslyn*, 36 Ill. App. 301.

"It is again objected to the allowance for this Joliet stone that it is in the contract provided that the decision of appellant's engineer on any dispute relative to the agreement shall be final and conclusive on the rights and claims of the parties. But there was no dispute. By the construction of the contract made, as we have seen, by the parties themselves, the extra cost of cutting the Joliet stone was treated as outside of and not controlled by the

written contract. It is only disputes relative to the written contract that the engineer's decision is to control. Where extra work and materials are of a different character from those specified in the contract, the provisions of the latter will not apply. *City of Elgin v. Joslyn*, 136 Ill. 525, affirming 36 Ill. App. above referred to.

"If, however, it be conceded, for the sake of the argument, that it was within the province of appellant's chief engineer to determine whether the extra allowance for cutting Joliet stone was covered by the written contract, he did so determine that it was not when he made a new agreement with Chapman and appellee that the latter should receive the extra dollar per cubic yard. Moreover, he allowed the extra dollar on about nine hundred cubic yards. Under the clause in question his decision was made 'final and conclusive' on the rights and claims of the parties. It would be equally conclusive upon both parties. He had no authority to make one decision today and change it to-morrow, after both parties had accepted and acted upon it in good faith. Moran had in the meantime procured and was using Joliet stone, and that clause could give Baldwin no power arbitrarily to set aside a 'final and conclusive' award in order to make another and different award upon the same point.

"It is contended that the trial court erred in directing by its final decree that appellee be entitled to an order of payment of \$5000 held by appellant for Moran's use, with interest, or so much of said sum, with interest, as shall remain when any judgments or orders in certain garnishment proceedings then pending against appellant should be satisfied or the liability thereunder terminated. It appears that two attachment suits had been commenced against appellee, and appellant had been garnisheed. The \$5000 referred to is a balance of the money appellant had received from Chapman for payment to Moran. By an agreement between appellant and appellee, made while this suit was pending, appellant was

to 'hold said \$5000 for the sole use and benefit of said Moran, after the payment of any sum or sums it may be found liable for as garnishee in said attachment proceedings.' The petition prays for such general relief as the case may require. We see no reason why the court, having jurisdiction of the subject matter and the parties, could not, under the pleadings and the evidence before it, settle the rights of the parties as to all matters relating to the litigation. Appellee ought not to be compelled to bring another suit to recover this \$5000 which the evidence shows is his money, due him on the sub-contract, and which appellant concedes it holds for his sole use and benefit, subject to the determination of the attachment and garnishment proceedings.

"As to that portion of the decree requiring payment of interest on said sum by appellant, we think it erroneous to provide for such payment now, it appearing that the money is rightfully withheld by appellant for its own protection. If, upon application for an order upon appellant under the decree, upon proper evidence of the discharge of appellant as garnishee, any reasons should appear for allowing interest, another question may arise. Appellant could not be allowed to retain for its own benefit appellee's money without compensating him for its use or detention, but it does not at present appear that it has done so. Until it does so appear it is premature, at least, to provide in the decree for the allowance of interest upon the money in question. We do not regard it as necessary to remand the cause because of the error in that respect, which only affects a possible future order in the case. If it becomes necessary for appellee to apply to the chancellor for an order requiring payment of this \$5000, it will be time enough then for the court to determine whether or not appellant has become liable for interest.

"For the reasons indicated the decree of the circuit court will be affirmed."

We fully concur in the views set forth in the opinion of the Branch Appellate Court rendered by Mr. Justice FREEMAN in this case and adopt the same as the opinion of this court.

The judgment of the Branch Appellate Court is affirmed.

*Judgment affirmed.*

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WILLIAM A. SIMMONS

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

*Opinion filed October 19, 1900.*

1. **INDICTMENT**—*when an indictment for obtaining signature by false pretenses is defective.* An indictment for obtaining the signature to a warranty deed by false pretenses is defective where it fails to connect the alleged false representations with the making of the deed, so as to show that they operated in obtaining the signature.

2. **SAME**—*how connection between false pretenses and obtaining of signature must appear.* In an indictment for obtaining the signature to a deed by false pretenses the connection between such pretenses and the obtaining of the signature must appear, either by a natural connection between them or the proper averment of such facts as will lead to a necessary legal conclusion of guilt.

*Simmons v. People*, 88 Ill. App. 334, reversed.

WRIT OF ERROR to the Branch Appellate Court for the First District;—heard in that court on writ of error to the Criminal Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

EDWIN L. HARPHAM, and JOHN C. STETSON, for plaintiff in error.

E. C. AKIN, Attorney General, (CHARLES S. DENEEN, State's Attorney, and ALBERT C. BARNES, of counsel,) for the People.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Plaintiff in error was convicted in the criminal court of Cook county of obtaining by false pretenses the signature of Thomas B. Bryan to a deed. The Branch Appellate Court for the First District affirmed the judgment.

A great many errors are assigned by plaintiff in error and are argued by the respective counsel, but it will only be necessary to consider the assignments that the trial court erred in overruling the motion of the defendant to quash the indictment, and his motion in arrest of judgment based upon the insufficiency of such indictment.

The indictment consists of six counts. They each charge the defendant with obtaining the signature of Thomas B. Bryan to a deed dated April 1, 1896, conveying to one Howard P. Simmons sub-lot 8 in the subdivision of lot 71 in the east part of Ellis' addition to Chicago, in the city of Chicago, county of Cook and State of Illinois, for and in consideration of the sum of \$175,000, as expressed in the deed. The first, second, fifth and sixth counts are substantially alike and the third and fourth are alike, the only difference being that in some counts the term "Clark syndicate" is used and in others the term "Clark syndicate companies" is employed, and the second, fourth and sixth counts set out the warranty deed *in hæc verba* and the others do not.

The third and fourth counts, which are the same in effect, allege that defendant, representing himself to be the executive head of a certain syndicate called by him the "Clark syndicate," controlling certain corporations, with intent to defraud Thomas B. Bryan made the following false representations to said Bryan: That defendant, as such duly authorized agent and head of such syndicate, was negotiating with Bryan for said lot; that defendant's son, Howard P. Simmons, was duly authorized, as the agent of such syndicate, to take, and was duly selected by such syndicate to take, the title of such



lot in his own name but in fact as trustee for said syndicate, for the use and convenience of said syndicate in trading, selling and conveying the same, and that said Howard P. Simmons was duly authorized, as such agent, to assume and agree to pay in his own name, for said syndicate, an encumbrance on said lot of \$75,000. They charged that the pretenses were made to induce Bryan to place his signature to the deed conveying said lot to Howard P. Simmons, and that said Bryan, by means of such inducements, affixed his signature to said deed and delivered the same to Howard P. Simmons. Each of such pretenses was duly negatived, and it was averred that defendant well knew that Howard P. Simmons was not authorized, as agent of the syndicate, to assume and agree to pay in his own name, for said syndicate, the said mortgage.

The first, second, fifth and sixth counts include in the allegation of false pretenses that the Clark syndicate or Clark syndicate companies, composed of one William Clark and associates, was then operating and controlling certain companies, to-wit: Carrabelle, Tallahassee and Georgia Railroad Company, Georgia and Florida Investment Company, Scottish Land and Improvement Company and Gulf Terminal and Navigation Company, and certain land then belonging to said Georgia and Florida Investment Company in the State of Florida; that defendant was the duly authorized and empowered agent to sell and exchange, and contract for sale and exchange of, said lands for other lands and property; that said lands were then worth \$10 per acre and were commanding that price on the market; that defendant, as the executive head of said syndicate and its authorized agent, was then and there, for and on behalf of said Clark syndicate, negotiating with Bryan for the purchase of said lot, and that by means of said representations, with others, he obtained the deed in question, whereas, in truth, the said Florida lands were not worth the sum of \$10 per acre and

were not then commanding that price in the market. The difference between these counts and the third and fourth is, that they contain the further charges of false representations concerning the value of the Florida lands. As against these counts making such charges concerning the Florida lands, it is argued that they are bad, because they do not state that any exchange of the Florida lands was made with Bryan for his lot or that such representations had anything to do with the making of the deed.

It is necessary, in order to constitute the offense with which defendant was charged, that the signature should be obtained by means of the false pretenses, and that fact must be adequately set forth in the indictment. The first, second, fifth and sixth counts, alleging false pretenses concerning the value of the Florida lands, do not show that any such pretenses had any connection whatever with the signing and delivery of Bryan's deed. They do not allege that any exchange of Florida lands was brought about by any representations of their value or that a deed was given in exchange for them. Counsel for the People concede that this point may be good as to said counts, and say that they do not rely upon said counts and made no attempt to support their allegations or to prove the value of the Florida lands. They say that they rely upon the third and fourth counts, and that the other counts should be eliminated from the discussion, and they confine their argument to the sufficiency of the third and fourth counts. The substance of the false pretenses alleged in those counts is, that the defendant was negotiating, as the agent and executive head of the Clark syndicate, with Bryan for the purchase of said lot; that Howard P. Simmons was the authorized agent of the syndicate to take the title for said syndicate, and was duly authorized, as the syndicate's agent, to assume and agree to pay the encumbrance in his name for said syndicate. The representations having been made, and being false and made with intent to defraud Bryan,

as alleged, it was next necessary, by the indictment, to connect them with the making of Bryan's deed, so as to show that they operated in obtaining his signature. The connection between the pretenses and obtaining the signature must appear either by a natural connection between them or by facts properly averred, so that the facts will lead to a necessary legal conclusion of the guilt of the defendant. So far as the averment that defendant pretended he was negotiating for the purchase of the property as the agent or executive head of a syndicate is concerned, the statement would make no difference to Bryan unless some obligation was assumed toward him involving an agency for the syndicate or the power of such executive head. If no such obligation was assumed, it could make no difference to Bryan in what capacity or for whom the defendant was acting, and there is no averment that the defendant assumed to act for the syndicate in the creation of any such obligation. The counts in question do not show in any way that the false pretenses as to the character in which the defendant was acting induced the making of the deed.

So, also, as to the pretenses that Howard P. Simmons was authorized to take the title to the lot for the syndicate and to assume and agree to pay the encumbrance in behalf of said syndicate. The indictment does not allege that he undertook or assumed to receive the title for such syndicate or to pay the encumbrance on the lot for or on behalf of such syndicate. The fourth count sets out the deed *in hæc verba*. It is a warranty deed, dated April 1, 1896, made by Thomas B. Bryan and Jennie B. Bryan, his wife, to Howard P. Simmons, conveying sub-lot 8, and contains this provision: "Subject, nevertheless, to an encumbrance now resting on said property, securing the principal sum of seventy-five thousand dollars (\$75,000), which, with accrued interest thereon since September 16, 1895, the party of the second part, being the grantee under this deed, hereby assumes and agrees to

pay." Howard P. Simmons was the grantee in the deed as an individual, in his own right, with no addition or description as trustee or agent of any syndicate, and nothing is said about any such syndicate or any agency. The copy of the deed set out shows only a personal obligation of Howard P. Simmons. So far as the counts go, the defendant represented that Howard P. Simmons had power to receive the title for the syndicate and to bind it by assuming and agreeing to pay the encumbrance, but he in fact never did so. The representation that he had power, for and on behalf of the syndicate, to assume and agree to pay the mortgage would have no effect to induce Bryan to make a deed to him, unless he did agree, for the syndicate, to assume and agree to pay the mortgage or bind the syndicate in some way to do it. The mere fact of his having such power as was alleged in the pretenses would not lead anybody to the conclusion that Bryan made his deed in consequence of his having the power. If the statement was false and Howard P. Simmons had no power to act for the syndicate by assuming and agreeing to pay the mortgage, it would be immaterial to Bryan and would not induce him to make the deed unless Howard P. Simmons assumed to exercise the power and agreed that the syndicate should pay the mortgage. Neither of the counts avers that Howard P. Simmons assumed to exercise the power which defendant represented that he had, or that such assumption of power related to the consideration of the deed or furnished any reason why it was executed.

The court erred in not sustaining the motion to quash and the motion in arrest of judgment.

\* The judgments of the Branch Appellate Court and the criminal court of Cook county are reversed and the cause is remanded to the criminal court.

*Reversed and remanded.*

THE PEOPLE OF THE STATE OF ILLINOIS, for use, etc.

v.

FRANKLIN D. KELLY.

*Opinion filed October 19, 1900.*

**APPEALS AND ERRORS**—*when appeal should be taken to Appellate Court.* In determining the right of the People to appeal to the circuit court from a justice court proceeding to recover the fine prescribed by section 8 of the Dentistry act, (Laws of 1899, p. 272,) the validity of such act is not involved since it does not attempt to give the right of appeal, but such right depends upon the construction of the act as to whether the proceeding is civil or criminal, and hence an order of the circuit court dismissing the appeal should be taken to the Appellate Court for review, even though one of the grounds of dismissal is that the act is unconstitutional.

APPEAL from the Circuit Court of Peoria county; the Hon. N. E. WORTHINGTON, Judge, presiding.

JOHN DAILEY, State's Attorney, and EDWIN HEDRICK, for appellant.

JAMES A. CAMERON, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

This was a suit in debt brought before a justice of the peace of Peoria county, in the name of the People of the State of Illinois, for the use of the Illinois State Board of Dental Examiners, to recover the fine prescribed by section 8 of the act regulating the practice of dentistry, (Hurd's Stat. 1897, p. 1080,) as amended by the act of 1899. (Laws of 1899, p. 272.) Section 8, as amended, is as follows: "Any person who shall violate any of the provisions of this act shall be liable to prosecution before any court of competent jurisdiction, in the name of the People of the State of Illinois, and upon conviction may be fined in any sum not less than \$25, nor more than \$100, for each and every offense. All fines and penalties recovered under this act shall be paid to the Illinois State

Board of Dental Examiners for their use." The summons was in the ordinary form of civil process before justices of the peace, and was served by reading. The jury found the issues for the defendant and the justice rendered judgment in bar of the action. The People took the case, by appeal, to the circuit court, where, on motion of the defendant, the court dismissed the appeal on the ground that it had no jurisdiction to entertain it. This is a further appeal by the People to reverse the judgment of the circuit court, brought directly to this court instead of the Appellate Court, on the alleged ground that the constitutionality of the statute is involved.

The bill of exceptions shows that the grounds alleged in the motion as showing a lack of jurisdiction of the appeal were, first, that the suit was a criminal prosecution, and the defendant having been discharged from liability before the justice of the peace could not be held to answer again for the same offense; second, that the statute is unconstitutional because it gives the board of dental examiners sole power to carry out the purposes and to enforce the provisions of the act, and gives to the board all fines and penalties recovered under it. The bill of exceptions also recites that for the reasons mentioned in support of the motion the court sustained the motion and dismissed the appeal for want of jurisdiction.

Counsel for both parties seem to take it for granted that this court has jurisdiction of the present appeal, and have directed their arguments to the two questions above mentioned,—that is, whether the case is a criminal or a civil proceeding, and whether the statute is constitutional or not. We are of the opinion, however, that the appeal should have been taken to the Appellate Court instead of this court. Our jurisdiction depends upon the question whether or not the validity of the statute is involved. If it was not involved in the decision of the court below in dismissing the appeal it is not involved here, for we can pass on such questions only as

were involved in the decision of the circuit court. It must be borne in mind that the cause was not tried *de novo* in the court below, and that only the appeal, and not the suit, was dismissed. The case differs materially from *People v. Miner*, 144 Ill. 308, relied on by appellee. In that case we held that the proceeding against Miner for violating the statute enacted for the protection of fish was a criminal prosecution, and that he, having been acquitted before the justice of the peace, could not be tried again or again put in jeopardy for the same offense on appeal or otherwise, and that the provision of that statute purporting to authorize the appeal violated section 10 of article 2 of the constitution. A casual examination of the two statutes will show material differences, not only respecting the suit or proceeding itself, but respecting the right of appeal. The law for the protection of fish itself provided for the appeal which was taken in the *Miner* case, and it was that provision which was declared invalid. But the statute regulating the practice of dentistry contains no provision for an appeal, and the right of appeal, if it exists, is given by other statutes. Consequently, so far as that right is concerned, the constitutionality of this statute was not involved, because it did not undertake to deal with that question. True, in determining whether or not the right of appeal on behalf of the People to the circuit court existed, it was necessary for that court to decide whether the case was a civil or a criminal one, and having decided that it was criminal, the dismissal of the appeal necessarily followed,—not because the statute was unconstitutional, but because there was no law which authorized such an appeal. It follows that the Appellate Court is the proper tribunal to determine, on appeal, the correctness of that decision. This must be so, for whether the prosecution to recover the fine authorized by section 8 is civil or criminal does not involve the validity of that section or of the act itself. It is a question of construction of

the statute and not of the constitution. It will not be claimed, of course, that the validity of the statute depends on the question whether the suit is a civil or criminal one, for if the legislature has the power to enact a statute regulating the practice of dentistry and to prescribe fines or penalties for violations of its provisions, it may, in its discretion, make the proceeding for the collection of such fines or penalties civil or criminal. In the statute for the protection of fish such violations were made misdemeanors, and the proceedings were as in criminal cases. (*People v. Miner, supra.*) But in the eleventh section of the act regulating the practice of medicine and surgery the proceeding to collect the fine there authorized was made a civil one. (*People v. Blue Mountain Joe*, 129 Ill. 370.) True, in the latter case it was held that the appeal by the People was properly taken directly to this court from the county court, for the reason that on the trial of the case the county court refused to admit proper evidence against the defendant, under said section 11, on the ground that that section was unconstitutional, thus directly involving the validity of the statute in the decision of the case. But in the case at bar the judgment appealed from did not involve the merits of the case, but only the right of appeal. Neither the parties nor the court below could make the validity of the statute a question involved in the case by either argument or decision that it was unconstitutional, when the constitutionality of the statute had nothing to do with the question whether the People had the right to appeal or not. Suppose it to be conceded that the effect of the verdict and judgment for the defendant in the justice's court was that the statute was unconstitutional; still, if it was a civil case the People had the right to appeal to the circuit court and have the case tried *de novo*, and the validity of the statute could be determined on such appeal only by another trial or on motion to dismiss the suit. The only question involved on the appeal



taken to this court is the proper construction of the statute and the consequent determination whether the case was a civil or a criminal proceeding. The decision of that question will determine the right of the People to take the appeal to the circuit court,—and that, too, whether the statute is constitutional or not.

It appearing that this court is without jurisdiction to entertain this appeal, it must be dismissed.

*Appeal dismissed.*

SWIFT & Co.

v.

PETER O'NEILL.

*Opinion filed October 19, 1900.*

1. MASTER AND SERVANT—*master's promise to repair applies to cases of defective original construction.* The rule permitting a servant to work for a reasonable time after the master's promise to remedy defects complained of, applies where the defect is in the original construction as well as where it is due to a falling out of repair.

2. SAME—*right of servant to recover though he was working in an unsafe place.* The rule which bars a servant from recovering for an injury received while working in a place known by him to be unsafe is based upon the fact of contributory negligence, and hence unless it can be said that he knew the extent of the danger he may maintain an action.

3. SAME—*rule as to servant's assuming risk of working in an unsafe place.* If the danger of working in a particular place is obvious, knowledge of that fact is attributable to the servant; but if the risk is no greater than that under which a prudent person would continue his employment under like circumstances, then the question whether such risk is assumed is properly left to the jury under all the evidence.

*Swift & Co. v. O'Neill*, 88 Ill. App. 162, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. A. H. CHETLAIN, Judge, presiding.

187	337
92a	*314
f92a	*316
f92a	320
187	337
95a	*496
187	337
98a	*137
e98a	*210
187	337
196	*349
187	337
e200	*109
200	*110
103a	*436
e103a	*437
187	337
202	*151
e202	*340
e202	*341
202	*342
187	337
203	*497
203	*564
206	349
e206	*351
106a	30
107a	*115
187	337
208	*159
187	337
111a	*290
112a	*238
112a	*457

AMERICUS B. MELVILLE, and F. J. CANTY, for appellant:

When a servant enters into a contract of hiring with the master he assumes all the risks incident to the employment, and is presumed to have contracted with reference to such risks. *Nealand v. Railroad Co.* 53 N. E. Rep. 137; Wood on Master and Servant, sec. 326; Bailey on Personal Injuries, sec. 455; *Murch v. Wilson's Sons & Co.* 168 Mass. 408; *Railway Co. v. Jackson*, 65 Fed. Rep. 48; *Railway Co. v. Lempe*, 59 Texas, 19; *Railway Co. v. Frawley*, 110 Ind. 21; *Consolidated Coal Co. v. Haenni*, 146 Ill. 614; *McCormick Machine Co. v. Burandt*, 136 id. 170; *Rolling Stock Co. v. Wilder*, 116 id. 100; *Pullman Car Co. v. Laack*, 143 id. 242; *Railway Co. v. Gillison*, 72 Ill. App. 222; *Pressed Brick Co. v. Sobkowiak*, 34 id. 312; 38 id. 537.

The rule of "assumed risks" assumes that the servant either actually knew the danger or by the exercise of ordinary care would have known of it. *McCormick Machine Co. v. Burandt*, 136 Ill. 170.

If the risk of the situation was open and apparent,—that is, as open and apparent to the plaintiff as to the master,—then the servant was not relieved from assuming the risk. *Agnew v. Supple*, 81 Ill. App. 437; *Railroad Co. v. Pettigrew*, 82 id. 34; *Brunt v. Mining Co.* 138 U. S. 483; *Toomey v. Eureka Iron Works*, 50 N. W. Rep. 850; *Leary v. Railroad Co.* 139 Mass. 580; *Cronon v. Orr*, 35 N. E. Rep. 648; *Bradshaw v. Railroad Co.* 21 S. W. Rep. 346; *Lynch v. Sagamore Manf. Co.* 143 Mass. 206; *Russell v. Tillotson*, 140 id. 201; *Kean v. Rolling Mill Co.* 66 Mich. 277; *Railway Co. v. Lempe*, 59 Texas, 19.

When the employee is one competent to act and is set at the performance of a task, the work and the manner of doing the same being left to his judgment, he cannot complain if injured by a wrong method of performing the work. *Brunt v. Mining Co.* 138 U. S. 483; *Cullen v. Borlout*, 126 N. Y. 1; *Brown v. McLeish*, 71 Iowa, 381; *Strable v. Railway Co.* 70 id. 555.

When the place is, at the time of injury, as it was originally constructed and as it was when plaintiff commenced work, then, if the condition was obvious when plaintiff made his contract to enter defendant's service and at the time he did enter such service, a request and promise to change or add to do not take the case out of the doctrine of assumed risk. It is not like a piece of machinery getting out of repair while the employee is working upon it, and a request and promise to repair that piece of machinery. *Murch v. Wilson's Sons & Co.* 168 Mass. 408; *Nealand v. Railroad Co.* 53 N. E. Rep. 137; *Fisk v. Railroad Co.* 158 Mass. 238.

FRANCIS T. MURPHY, and THADDEUS S. ALLEE, for appellee:

It is the duty of the master to furnish the servant a reasonably safe place to work. If he violates this duty and the servant is injured the master is liable. *National Syrup Co. v. Carlson*, 155 Ill. 210; *Railroad Co. v. Sweet*, 45 id. 197; *Railroad Co. v. Welch*, 52 id. 183; *Mahew v. Mining Co.* 76 Me. 100; *Railroad Co. v. Conroy*, 68 Ill. 560; *Railroad Co. v. Ingraham*, 77 id. 309; *Railroad Co. v. Scanlan*, 170 id. 106; *Illinois Steel Co. v. Schymanowski*, 162 id. 449.

It is for the jury to say whether the master has complied with this duty. *Weber Wagon Co. v. Kehl*, 139 Ill. 644.

The servant has the right to assume the master will perform the duties imposed upon him by law, and to act on such presumption, using reasonable care for his own safety. *Rolling Stock Co. v. Wilder*, 116 Ill. 100; *Illinois Steel Co. v. Schymanowski*, 162 id. 448; *Pullman Car Co. v. Laack*, 143 id. 242; Bishop on Non-contract Law, secs. 647, 648.

When the master promises the servant to remedy a defect, the servant may continue in the service a reasonable length of time, relying on the master to fulfill his promise, without thereby assuming the risk. *Furnace Co. v. Abend*, 107 Ill. 44; *Weber Wagon Co. v. Kehl*, 40 Ill. App. 584; 139 Ill. 644; *Swift & Co. v. Madden*, 165 id. 41; *Pressed*

*Brick Co. v. Sobkowiak*, 148 id. 578; *Illinois Steel Co. v. Schymanowski*, 162 id. 448; *Illinois Steel Co. v. Mann*, 170 id. 200; *Donley v. Dougherty*, 174 id. 582.

When the master, knowing the increased dangers, orders the servant to perform the work, and in doing so the servant is injured, the master is liable. *Illinois Steel Co. v. Schymanowski*, 162 Ill. 448; *Offutt v. World's Columbian Exposition*, 175 id. 472; *Pressed Brick Co. v. Sobkowiak*, 148 id. 573; *Morris v. Pfeffer*, 77 Ill. App. 516; *National Syrup Co. v. Carlson*, 155 Ill. 210; *Aldridge v. Midland B. F. Co.* 78 Mo. 565; *Keegan v. Kavanagh*, 62 id. 230; *Lee v. Woolsey*, 109 Pa. St. 124; *Fewen v. Railroad Co.* 143 Mass. 197; *Kronz v. Railroad Co.* 123 N. Y. 1; *Lebanon v. McCoy*, 40 N. E. Rep. 700; *Railroad Co. v. Leathers*, 40 id. 1094; *Mulcaines v. City*, 67 Wis. 24.

Mr. JUSTICE WILKIN delivered the opinion of the court:

Appellant prosecutes this appeal to reverse a judgment of the Appellate Court affirming a judgment of the superior court of Cook county against it, in favor of Peter O'Neill, appellee, for an injury to his person, the damages being assessed at \$5000.

The declaration avers that plaintiff was in the employ of the defendant, Swift & Co., in an apartment of their packing plant used for smoking meats, and that he was injured by reason of the failure of the defendant to furnish suitable and proper lights in said apartment. It appears from the evidence that the building in which the accident occurred was known as the new smoke-house, in which the plaintiff had been employed from about May 15, 1897, to June 11, following, when he was hurt. He had previously worked in another part of the plant. The new building was six stories high; and was divided into small rooms, in which the meat was placed on trucks and there cured or smoked. Between these rooms, extending along the width of the building some one hundred and twenty-five feet, were narrow hall-ways, into which

the doors of the rooms opened. Along the ceiling of the hall-ways were stretched electric wires, with a socket for a globe opposite each door, but there were no globes attached. When the plaintiff and other workmen who were employed in taking the meat out of the rooms came to a door which they wished to open, a globe was attached to the wire and the light turned on. When the work was completed in that room the globe was removed and again attached opposite the new place of employment. There were windows at one end of the halls, which furnished but a partial light. Soon after the plaintiff began working in that building he complained to his foreman that the light was insufficient and that it was unsafe to work there on that account. It does not appear that the foreman made any direct promise to him in regard to furnishing additional lights, but it does appear that he told him he would refer the matter to the superintendent, and the evidence tends to show that the foreman afterwards informed plaintiff that the superintendent promised to remedy the defect, and one of the theories of plaintiff's case is, that upon the faith of that promise he continued to work until injured. At the time of the accident he was ordered by the foreman of his gang to attach the globe to the electric wire, which he attempted to do by standing upon a truck and reaching up to the wire. While in this position others employed with him in moving another truck along the hall-way ran against the one on which he was standing, knocking him off and injuring one of his legs between the foot and the knee, by scraping the skin and flesh from it, the testimony of physicians being to the effect that the injury was a very severe and painful one and probably permanent in its character.

At the close of the evidence defendant requested the court to instruct the jury to return a verdict of not guilty, which was denied.

Upon the trial of the case it was contended on behalf of defendant that the evidence failed to show such due

care on the part of the plaintiff as would entitle him to recover, even though it was shown that the defendant was guilty of the negligence alleged; also, that the latter fact was not established, and that the injury resulted from the negligence of co-employees, and therefore no recovery could be had. All these questions have been settled by the verdict of the jury and the judgment of affirmance in the Appellate Court, unless it could be said that there was no evidence tending to support plaintiff's contention on these propositions,—and this we do not think can be maintained.

The principal contention of appellant in this court, going to the merits of the case, is, that the plaintiff, under his own evidence, assumed the risk which resulted in his injury, and upon that ground the court erred in refusing to withdraw the case from the jury. It is well understood that, as between employer and employee, the latter assumes all the usual known dangers incident to the employment, and that he also takes upon himself the hazard of the use of defective tools and machinery, if, after the employment, he knows of the defect but voluntarily continues in the employment without objection; also, if a servant acquires knowledge of defects, after his employment, which increase the risk or danger, and gives notice to the master of that fact, and the latter promises to remedy the defects within a reasonable time, the servant may continue in the performance of his duties without being held to have assumed the increased risk, the reason of this rule being, that by the promise of the master a new relation is created between him and the employee, whereby the master impliedly agrees that the servant shall not be held to have assumed the risk for a reasonable time following his promise. As before stated, the plaintiff below relied upon this principle to relieve him of the burthen of assumed risk; but the defendant now insists that there was no evidence whatever tending to prove that the defendant, through any one authorized

to make the promise, agreed to furnish additional or better lights in the places where the plaintiff was employed, and, in fact, that no definite promise was made by any one to remove the alleged defect. Manifestly, in a case of this kind, the defendant being a corporation and acting only through agents, there must be found somewhere among its employees persons who so far represented it that notice to them, and their promise, will be binding upon the master. And while we are not prepared to say the evidence is entirely satisfactory to that effect, yet we do think that it so far tended to prove that the superintendent occupied such a position, and that he was notified of the plaintiff's complaint and promised to furnish additional lights, as that the question was properly submitted to the jury.

It is also contended by counsel for the appellant that the foregoing rule as to notice of defects and a promise to remedy them does not apply to cases where the original construction is defective, but only where the place, machinery, appliance, etc., becomes less safe and secure than originally constructed. We are unable to see any rational ground for this distinction, although cases are cited which seem to recognize it. The justification of the servant continuing in the employment after discovering the defects, as above stated, rests upon the promise of the master to remove that defect; and, whether it arises from the original construction or imperfections resulting from the use, if he sees proper, upon the complaint of his employees, to promise to remove the danger, we see no reason why he should not be bound by that promise in the one case as well as in the other.

We do not think, however, that it is necessary to place the plaintiff's case entirely upon the alleged promise to furnish additional lights in the building. While it is true, as stated, that where an employee becomes informed of defects in the place in which or the appliance with which he is required to work, and continues in that em-

ployment without any promise to correct the defects, he must be held to assume the risk, that rule is subject to well-defined qualifications. The question whether a servant is barred of a right of recovery for injuries incurred by working in an unsafe place or using appliances known by him to be defective, on the ground of assumed risk, is, in fact, based upon the rule that one cannot recover for an injury to the incurring of which he has contributed by his own negligence. Hence, although he may know of the defects, yet unless, under all the facts and circumstances of the case, it can be said he knew of the extent of the danger, he may still maintain his action. That is to say, an employee may know of defects in such place or appliance and yet be justifiable in the belief that by the exercise of proper care no immediate danger from such defects will be incurred, and therefore his right of recovery not be defeated. "The true rule, as nearly as it can be stated, is, that a servant can recover for an injury suffered from defects due to the master's fault, of which he had notice, if, under all the circumstances, a servant of ordinary prudence, acting with such prudence, would under similar conditions have continued the same work under the same risk; but not otherwise. All the circumstances must be taken into account, and not merely the isolated fact of risk." (1 Shearman & Redfield on Negligence, sec. 211.) "Where the instrumentality with which a servant is required to perform service is so glaringly defective that a man of common prudence would not use it, the master cannot be held responsible for damages resulting from its use. But if a servant incurs the risk of machinery which, though dangerous, is not so much so as to threaten immediate injury, or where it is reasonable to suppose it may be safely used with great skill or care, mere knowledge of the defects on the servant's part will not defeat a recovery. Negligence on the part of the servant, in such cases, does not necessarily arise from his knowledge of the defect, but is a question of fact to



be determined from such knowledge and the other circumstances in evidence." (5 Rapalje & Mack's Digest of Railway Law, sec. 352, *et seq.* p. 208. See *Huhn v. Missouri Pacific Railway Co.* 92 Mo. 440, and authorities there cited.) It is also said in note 1 to section 211 of Shearman & Redfield, *supra*: "It is generally a question for the jury whether the surrounding circumstances made it contributory negligence for the servant to continue using the appliances,"—citing authorities.

When it is said that an employee assumes all the *usual known dangers* incident to his employment, and that he must have knowledge of the unsafe and defective character of appliances, or that it must be shown that he has knowledge of the fact that defects render the appliances dangerous, the term "knowledge," as used in defining assumed risks, means no more than that all the facts and circumstances surrounding the given case must be sufficient to charge the employee with the required information. If the danger is obvious, knowledge of that fact will, of course, be attributable to the employee; but if, as already said, the risk is no more than that under which a prudent person would, under like circumstances, continue his employment, then certainly he cannot, as a matter of law, be held to assume the risk. And so in this case, it was a question proper to be left to the jury, under all the evidence, whether the risk was assumed or not.

Contrary to our rule the appellant has filed in this court the statement of case, brief and argument filed in the Appellate Court, containing the discussion of questions not open to review here. We have, however, given attention to such assignments of error of law as are properly made here, and find no substantial reasons for dissenting from the views announced by the Appellate Court in its opinion. We think its judgment is in conformity with the law and facts of the case, and it will accordingly be affirmed.

*Judgment affirmed.*

TELITHA MUNRO

v.

SAMUEL M. BOWLES.

*Opinion filed October 19, 1900.*

187	346
199	457
187	346
212	399

DEEDS—*what will not render delivery to third party ineffectual.* Delivery of a deed by the grantor to a third party, for the grantee, is not rendered ineffectual because the third party, for safe keeping, places the deed, with another paper of her own, in a trunk belonging to the grantor, to which he carried the key.

MAGRUDER, J., dissenting.

APPEAL from the Circuit Court of Rock Island county; the Hon. W. H. GEST, Judge, presiding.

MCENIRY & MCENIRY, and SWEENEY & WALKER, for appellant.

W. J. ENTRIKEN, and J. T. KENWORTHY, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

In an action of ejectment brought by the appellant, Telitha Munro, against the appellee, Samuel M. Bowles, in the court below, to recover a farm of three hundred and twenty acres in Rock Island county, there was a verdict of not guilty and a judgment for defendant, the appellee. On this her appeal the appellant contends that upon the evidence the verdict and judgment should have been for the plaintiff, and that the court erred in the instructions given to the jury.

The appellant claimed title as the only heir-at-law of her father, Samuel Bowles, deceased. The appellee claimed title through a warranty deed from said Samuel Bowles. The evidence tended to prove that the appellee was the illegitimate son of said Samuel Bowles, who, as it was shown, recognized appellee and brought him up as his own son. He was a man of wealth, and it clearly

appeared that it had long been his avowed purpose to give the farm to appellee. On June 29, 1898, he called on his attorney at Moline, Illinois, and told him of his purpose to make such gift and requested him to prepare a deed to his said son for the land. The attorney drew the deed as requested, the consideration expressed being natural love and affection and one dollar. The deed was read to, approved and signed by Samuel Bowles, who took it away with him to a notary public, before whom it was duly acknowledged. The only question in the case is, whether or not there was any effective delivery of the deed. When the deed had been prepared and before the grantor took it from the office of his attorney, the attorney asked him if he was going to give it (the deed) to his son, to which Bowles replied, "Not during my lifetime." The attorney then said to him, "Do you know that if you should keep this deed in your possession and it should be found among your papers after your death it would be worthless?" Bowles replied that he did not know that. His attorney then informed him that such was the law, and advised him to deliver the deed to a third person beyond his recall, with instructions to such person to deliver it, after the grantor's death, to the grantee. We are satisfied that he undertook to carry out the instructions of his attorney, and, as found by the jury, intended to make, and did make, an effectual delivery of the deed as an escrow. He was living alone, except that he had a housekeeper. On the same day that the deed was drawn and executed he returned home and told his housekeeper, Miss Witherspoon, of his attorney's instructions for him to make a delivery of the deed. She testified, in substance: "He said he would give the deed to me to keep, and at his death that I should give it to Sam, (the appellee,) and I told him I would. He then handed me the deed and I took it. It was in an envelope, with Sam's name on the back of the envelope. I asked him what I could do with it, and he told me I could keep it

in his trunk, and he handed me the key. The trunk was locked. I went into his room and put the deed in the right hand corner of the trunk with a sewing machine receipt which I had there. The trunk was the safest place in the house." A few months after the deed was made Samuel Bowles fell unconscious while walking up the steps of his residence and expired almost immediately after having been taken to his room. After he was dead Miss Witherspoon, in whose hands the deed had been placed by Mr. Bowles, took from his vest pocket the key to his trunk and then unlocked the trunk and took therefrom the deed in question, and shortly thereafter delivered it to Samuel M. Bowles, the grantee, who filed it for record. She testified that the deed was in the envelope in the same place in the corner of the trunk, with her machine receipt, where she had placed it when it was put into her hands for delivery to appellee.

The evidence shows, beyond all doubt, that from what the grantor did and said he intended to make an effectual delivery of the deed. In *Hawes v. Hawes*, 177 Ill. 409, we reiterated what had been said in substance in many previous cases, that "no special form or ceremony is necessary to constitute a sufficient delivery. It may be by acts or words, or both, but something must be said or done showing an intention that the deed shall become operative to pass the title and that the grantor loses all right of control over it. The delivery need not necessarily be made to the grantee, but may be made to another in his behalf and for his use; but it is indispensable that the grantor shall part with control over the deed and shall not retain a right to reclaim it." *Hayes v. Boylan*, 141 Ill. 400; *Provart v. Harris*, 150 id. 40; *Wilson v. Wilson*, 158 id. 567; *Shults v. Shults*, 159 id. 654.

It is contended in the case at bar that the grantor, Samuel Bowles, retained control of the deed, because after he delivered it to Miss Witherspoon she put it in his trunk to which he carried the key, and that he virtually

retained possession of the deed until his death. The argument is, that what was done after the execution and acknowledgment of the deed was all one transaction, the effect of which was that the grantor retained full control of the deed, with the right and power to recall or reclaim it at any time, according to his pleasure. So far as the question of fact is concerned, the jury and the court below have found against this contention, and we think their finding is sustained by the evidence. The evidence shows that he never did attempt to recall or reclaim the deed or to exercise any control over it whatever, except that he permitted its custodian to keep it in his locked trunk, with a paper belonging to her which she kept in the same place. His intention to carry out the instructions of his attorney and to make an effective delivery beyond his right of recall is clear. Had Miss Witherspoon placed and kept the deed in a trunk or other place of deposit belonging to her no question as to the delivery could have arisen. The question then is, does the mere fact that she put the deed in his trunk to which he carried the key, immediately upon its delivery to her, necessarily render such delivery, or alleged delivery, ineffectual? We think not. Such a fact, in connection with others, might cast suspicion upon the intention of the grantor and give rise to the conclusion that the attempted delivery was only colorable and that he had no intention of parting with the control of the deed; but in the case at bar there was no evidence whatever that he did not intend in good faith to make a complete and final delivery of the deed as an escrow, but, as before said, the evidence was that he did so intend. So far as he was concerned the act of delivery was complete, and no conditions were attached to it, except that the person to whom it was so delivered should, at his death, deliver it to the grantor. This condition was fulfilled, and we cannot say, as a matter of law, that because the custodian put and kept the deed in a receptacle belonging to

him, where he could, by the exercise of mere physical power, regain the actual possession of the instrument as against such custodian, he did not part with all dominion and control over the deed. Once parted with it was gone forever, and he could not thereafter rightfully or effectually re-assume a control which he had parted with, even if he had obtained possession of the deed; nor did he attempt to do so, but suffered the deed to remain undisturbed where Miss Witherspoon had placed it.

We are disposed to agree with the findings below that the grantor did intend to make, and did in fact make, a delivery of the instrument. The instructions of the court to the jury were in harmony with these views, and no other error is pointed out.

The judgment will be affirmed.

*Judgment affirmed.*

Mr. JUSTICE MAGRUDER, dissenting:

In my opinion there was no valid delivery of the deed. The deceased directed his house-keeper to take the deed, and put it in his trunk, which was in his bed-room. As soon as she placed it in his trunk, she gave him the key to his trunk. He put the key in his vest pocket and carried it there for several months until his death. It was found in his pocket after his death. It is evident that the deed never left his possession or control. Being in his trunk in his bed-room the deed was all the time in his sight, and, having the key in his hands, he could get the deed and destroy it at any time. (*Byars v. Spencer*, 101 Ill. 429; *Walls v. Ritter*, 180 id. 616; *Hawes v. Hawes*, 177 id. 409; *Walter v. Way*, 170 id. 96; *Hayes v. Boylan*, 141 id. 400; *Shults Shults*, 159 id. 654; *Provart v. Harris*, 150 id. 40; *Wilson v. Wilson*, 158 id. 567).

CHARLES J. HAWLEY *et al.*

v.

FRANK O. HAWLEY.

*Opinion filed October 19, 1900.*

1. EVIDENCE—*what sufficient to permit secondary proof of contents of deed.* Secondary evidence of the contents of an unrecorded deed may be received upon proof that the deed was executed and delivered to the grantee, who subsequently handed it, with other papers, to the grantor to keep in his safe, and that after the latter's death the deed could not be found though diligent search was made among the papers of the deceased.

2. APPEALS AND ERRORS—*when denial of motion to amend and make proof is harmless.* Denial of a motion to amend the answer and make additional proof is harmless, where the defense sought to be set up by the motion is available under the issues already made.

3. SAME—*findings of decree must be within the allegations.* A decree in a proceeding to establish title must be reversed as to a finding that one of the deeds executed by complainant was intended as a mortgage, where there is no allegation in the bill or answer of the existence of any indebtedness, nor any claim made that any conveyance between the parties was intended as a mortgage.

APPEAL from the Circuit Court of Kendall county; the Hon. GEORGE W. Brown, Judge, presiding.

This is a bill in chancery by Frank O. Hawley, one of the heirs of Paul G. Hawley, deceased, against Christine J. Hawley, the widow, and Charles J. Hawley and others, the other heirs, seeking to establish title in complainant to a farm of two hundred and sixteen acres, known as the "Morgan farm," and also a tract of about eight acres, known as the "Judson homestead," in Kendall county, under and by virtue of two alleged lost and unrecorded deeds. The bill, as amended, sets forth that on March 13, 1891, Paul G. Hawley was the owner in fee simple of these two tracts of land; that on that day he, being joined by his wife, Emily M. Hawley, by deeds made, executed and delivered, conveyed the said lands to complainant; that on February 10, 1898, Paul G. Hawley died; that

since the date of the conveyance complainant has been in possession of the lands; that the said deeds were delivered to complainant but were never recorded, and have since become lost or destroyed and cannot be found, diligent search having been made for them; that the widow and heirs refuse to execute a deed to complainant for said lands; that complainant is owner in fee of certain other lots, and that defendants are seeking to disturb his title, and claim some right therein. The prayer is that the lost deeds may be decreed to be a good and valid title to the property, and that the other heirs may be decreed to execute to complainant a new deed, and in default thereof that the master in chancery make such conveyance.

The several defendant heirs and Christine J. Hawley (who was the wife of deceased at the time of his death, he having previously obtained a divorce from his former wife, Emily M. Hawley, and re-married,) filed answers, admitting that the deceased was the owner of the lands on the 13th day of March, 1891, but denying that he made the alleged deeds to complainant, and denying his possession of the property, and alleging that such deeds never existed. The widow, Christine J. Hawley, claimed dower in the lands.

Upon the issues thus made the cause was tried before Judge George W. Brown, in Kane county, in September, 1899, upon evidence introduced in open court. On November 8, following, a decree was entered finding that on said March 13, 1891, Paul G. Hawley received from complainant the title to the Judson homestead and the Morgan farm; that on said date Paul G. Hawley made and delivered to complainant the two deeds, as alleged in the bill, re-conveying to him the two tracts of land; that Paul G. Hawley, at the time of his death, had no right, title or interest in the said real estate other than as mortgagee of a portion thereof (the Morgan farm) to the extent of \$1100, and interest from March 13, 1891, and that no dower interest accrued to the widow or right



descended to the other defendants, as the heirs of the deceased; that on and before said March 13, 1891, Frank O. Hawley was the owner in fee of the Morgan farm, and on that day he and his wife conveyed the same to Paul G. Hawley as security for a loan of \$1100; that the deeds afterwards made by Paul G. Hawley to complainant conveying back these premises, have been lost or destroyed; and it is adjudged the complainant is the owner in fee simple of the Judson homestead tract, the Morgan tract and the lots in question, and it is ordered that upon the payment by complainant to the administrator of the estate of Paul G. Hawley, deceased, of the sum of \$1100, with interest from March 13, 1891, the widow and heirs of deceased make to complainant a quit-claim deed conveying the Morgan tract, and in default of their doing so that the master make such deed; and it is further ordered that the widow and heirs be perpetually enjoined from setting up any claim in or to any portion of said lands. To reverse that decree defendants below prosecute this appeal, and the complainant assigns cross-errors on the record.

It is contended by appellants that the chancellor erred in finding, from the evidence, that deeds had been made and delivered to appellee conveying the two tracts of land in controversy; that the finding is not in accord with the allegations of the bill, in that it is found that the deed from complainant to Paul G. Hawley conveying the Morgan tract was in fact a mortgage and made to secure the payment of the sum of \$1100; that the court erred in refusing to allow defendants to amend their answers so as to set up color of title and seven years' payment of taxes and possession, and to put in additional proof to sustain these allegations; that the court erred in denying appellants' motion to exclude all the evidence relative to the contents of the lost deed for want of sufficient ground being first laid, and that the decree was against the evidence.

CHARLES WHEATON, HANCHETT & SCOTT, and JOHN M. RAYMOND, for appellants.

S. N. HOOVER, (R. G. MONTONY, of counsel,) for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

The chief question in the cause is whether or not Paul G. Hawley, on March 13, 1891, executed and delivered to appellee, Frank O. Hawley, the two deeds, as alleged in his bill. The evidence contained in the record is unusually and unnecessarily voluminous, and cannot be reviewed within the reasonable scope of an opinion, and if it could, no good purpose would be served by doing so. The facts, so far as they bear upon the issues in the cause, are few, and the law applicable thereto is not difficult of ascertainment.

Whether or not it was proven on the hearing that the two deeds re-conveying the lands to appellee were actually made and delivered, depends upon the credit to be given the testimony of complainant's witnesses. The notary who took the acknowledgments of the deeds testifies positively that he acknowledged two deeds from appellee to Paul G. Hawley,—one conveying the Morgan farm and the other the Judson homestead,—and shortly after, on the same day, two deeds by Paul G. Hawley and wife conveying the same tracts back to Frank O. Hawley, and that he saw the four deeds delivered to the grantees; also, that in 1897 he saw the deeds from Paul G. Hawley to appellee again, in the latter's possession. Soon after the time the deeds were made, W. H. Hopkins says he saw them in appellee's possession. J. Ivor Montgomery, a surveyor, testifies that he examined these deeds and identified the descriptions; had them in his possession and saw them last in 1897. These witnesses are uncontradicted. The only attempt on the part of the defendants to show that no such deeds were in existence or ever

delivered was by introducing witnesses to show that the reputations for truth and veracity of those introduced by the complainant were bad. The chancellor having seen and heard the witnesses testify, (except Mr. Montgomery, whose deposition was read upon the trial,) and also having heard the witnesses offered to impeach them, as well as the many introduced by complainant to sustain their reputations, could best judge of the truthfulness of those relied upon by complainant to establish his case. The rule is too well settled to require the citation of cases, that under such circumstances a court of review will only disturb the findings and decree of the chancellor when all the facts and circumstances proved wholly fail to sustain such finding and decree. That rule is applicable here, and, applied to the case, must result in affirmance of the finding of the chancellor on this question of fact.

The contention by appellants that the court erred in denying their motion to exclude all the evidence relative to the contents of the alleged deeds from Paul G. Hawley to appellee for the want of sufficient foundation being laid for such proof by first showing their loss or destruction, is without merit. Unless the undisputed evidence on that subject be rejected as untruthful, (and no sufficient grounds for doing so are shown,) it establishes the fact that the deeds in question were given by complainant, with other papers in a package, to the deceased, Paul G. Hawley, at his office for safe keeping, shortly before his death, and there left, with other papers of appellee. It appears inquiry was made at the recorder's office, but it would seem such inquiry was merely formal, as the positive testimony is that the instruments were placed in the hands of the deceased in the fall of 1897. A diligent search is shown to have been made among the papers at the office of deceased and in the safe where he kept such papers, but the deeds were not found. There was no evidence tending to prove that they were, at any time after being left there, removed from the office of the

deceased. We are satisfied sufficient proof of loss or destruction of the two deeds in question was made, in order to warrant the introduction of secondary evidence to prove their contents. The reason for placing the instruments in the hands of his father was, that he at that time had no safe and his father had.

After the hearing of this cause a motion was made to amend the answers of defendants, setting up seven years' possession of the property in controversy in Paul G. Hawley under claim and color of title and payment of taxes, and to put in additional proof to sustain those allegations. The motion was properly denied. It having been shown that the title was in appellee by two deeds executed and delivered, although not placed upon record, the defense of color of title, etc., in Paul G. Hawley, if set up, must have failed. Moreover, the claim by complainant that the deceased had conveyed these two tracts of land to him, and denied by the defendants, presented the question as to whether Paul G. Hawley had title to the lands or not at the time of his decease. The denial of the motion therefore deprived the defendants of no right, the defense sought to be set up by the motion being available under the issues actually made.

The contention of appellants that the finding of the decree is not in conformity with the allegations of the bill is urged by both parties, and raised by appellee by assigning a cross-error, by which the correctness of the decree below is questioned in so far as it holds the deed to the Morgan farm a mortgage given to secure the payment of \$1100, and requires him to pay to the estate of his father that sum, with interest from March 13, 1891, as a condition precedent to his receiving a deed from the widow and heirs of Paul G. Hawley, deceased. This cross-error, we think, must be sustained upon either one of the two following grounds:

First, there was no issue of that kind before the court, upon the pleadings. No mention of an indebtedness

from Frank O. Hawley to his father is mentioned or alluded to, either in the bill or answers. Neither is there any claim made by the defendants, or by the bill itself, that any conveyance between the parties was intended to be a mortgage. It will not be necessary to do more in this connection than to refer to the oft repeated rule in chancery practice, that the *allegata et probata* must correspond. Therefore, even if it could be said that the proof as to the indebtedness and intended mortgage sustains the decree of the court below, that decree would have to be reversed for want of a sufficient allegation upon which to base it.

But secondly, all parties agree, as they must under the plain provisions of the statute, that Frank O. Hawley, in this suit against parties defending as the heirs of a deceased person, was incompetent as a witness, and that the court below properly excluded his testimony from the record. That being done, there remained no proof whatever of any fact upon which the idea of an indebtedness from him to his father, or a mortgage to secure the same, could be predicated. It seems to be contended on behalf of appellee that while his testimony was incompetent to establish any fact in his favor, in so far as he testified against himself his evidence should be considered competent. On this theory it is claimed his evidence of an indebtedness from himself to his father ought to be received as establishing that fact. It is to be observed, however, that in the very same connection,—in fact, as a part of the statement that he became indebted to his father,—he states that that indebtedness was paid off and satisfied. Conceding that his testimony against his interest, although testifying in his own behalf, might be competent to prove an existing indebtedness in favor of his father against himself, we do not think it can be seriously contended that his single statement in regard to the creation of the debt can be separated from the rest of his testimony so as to bind him by

that which is against his interest and at the same time deprive him of that part of the connected statement which shows the payment of the indebtedness. In other words, the defendants cannot be permitted, under their general objection to his competency,—thereby procuring from the court an order excluding his testimony,—to turn about and insist that so much of his evidence as is favorable to their case shall be received. In the condition of this record we consider the testimony of Frank O. Hawley as entirely outside of it. But if it were otherwise, the defendants below could derive no affirmative relief, such as is given them by the decree upon that evidence.

For the error indicated the decree of the circuit court must be reversed, and the cause will be remanded to that court with directions to proceed in conformity with the views herein expressed.

*Reversed and remanded.*

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E. E. NAUGLE *et al.*

*v.*

CHARLES T. YERKES.

*Opinion filed October 19, 1900.*

187	358
102a	'596
187	358
202	'418

1. **CONTRACTS**—*one rescinding contract for fraud should place other party in statu quo.* One who desires to rescind a contract for fraud must act promptly and at once tender back what he has received under the contract, and if he remains silent or in any way recognizes the validity of the contract after discovering the alleged fraud he is bound thereby.

2. **SAME**—*when party cannot rescind contract by bill in chancery.* If parties to a construction contract agree that the value of "special work" shall be fixed by a third party in case of dispute, the fact that such third party is alleged to be in the employ of one party under a fraudulent agreement to undervalue the work does not give the other party the right to rescind the contract by bill in chancery, if all parts of the contract except the making of the award have been performed, as he has an adequate remedy at law.

*Naugle v. Yerkes*, 83 Ill. App. 310, affirmed.

**APPEAL** from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. MURRAY F. TULEY, Judge, presiding.

This is a bill in equity filed by the appellants on the 11th day of April, 1898, in the circuit court of Cook county, against the appellee, praying that an agreement between the appellants and appellee, bearing date July 26, 1897, be rescinded and canceled, and that appellee be decreed to account to appellants for all of the stocks and bonds of the Suburban Railroad Company received by him under and in pursuance of said agreement, together with the possession of said railroad and the income derived therefrom since July 26, 1897. The bill having been amended, appellee filed a general and special demurrer thereto, which was sustained, and the appellants having elected to stand by their bill, a decree was entered dismissing the bill and for costs. The Branch Appellate Court for the First District having affirmed such decree, an appeal has been prosecuted to this court from such decree of affirmance.

On the 23d day of May, 1895, the Suburban Electric Railroad Company was organized under the laws of the State of Illinois, with power to construct and operate a railroad from the city of Chicago to cities, towns and villages in Cook, Lake, DuPage and Kane counties. The name thereof was subsequently changed to the Suburban Railroad Company. Said corporation, after its organization, obtained from said cities, towns and villages the right to construct its railroad through such territory, and on or about the 20th day of July, 1895, it entered into a contract with one Charles S. Leeds for the construction and equipment of its railroad and appurtenances. Said Leeds having failed to construct and equip said railroad, he was succeeded by the Suburban Construction Company, a corporation organized to construct and equip

said road, and said construction company having failed to construct and equip the said railroad, it, in turn, was succeeded by appellants. The appellants, by reason of financial embarrassment, brought about, as alleged in their bill, by the wrongful acts of appellee, being unable to complete the construction and equipment of said railroad, on the 26th day of July, 1897, made the contract with appellee sought by this bill to be canceled and annulled, in lieu of which, by reason of its length, we insert a synopsis thereof prepared by the chancellor who tried the case below, which is as follows:

"The agreement provides for the assignment to Yerkes of the construction contract under which the complainants were building the railroad, Yerkes agreeing to assume and protect complainants from certain indebtedness and claims against complainants, incurred in connection with carrying out the contract for the building of the road, and also against other claims which had been assumed by the complainants when they obtained their construction contract, amounting to many thousand dollars. Yerkes also was to refund certain specified items of over \$35,000, and refund certain items of payments made by the complainants in connection with the Leeds contract, amounting to over \$42,000, and to protect the complainants against liability upon bonds given various municipalities and other bonds of the railroad and of the Suburban Construction Company; also to protect the complainants in their contract with the Suburban Construction Company as to the payment of certain interest and as to certain assumptions of debts and contracts of said construction company and of said Leeds; also to protect complainants against suits for personal injuries arising out of the performance of their construction contract, or the operation of the roads or the operation of leased lines by the complainants. Upon delivery of the agreement of July 26, 1897, it was provided that certain shares of stock of the railroad company were to be de-



livered by the complainants to Yerkes upon the payment of \$125,000; that Yerkes was to pay \$50,000 in August and in September following. The complainants were to finish building the railroad in accordance with the provisions of their said contract with the construction company, which was assigned to Yerkes, except as modified by the agreement with Yerkes, and to receive the certificates of the engineer of the railroad therefor as the work progressed, which certificates were to be paid by Yerkes on presentation. In the contract with Yerkes the complainants agreed to build a certain power house and to do certain 'special work' in connection with the building of the railroad, all of which was to be paid for 'at cost,' to be determined by M. K. Bowen. Some of the special work was done and ready to be put in place at the date of the contract with Yerkes, and other portions of said work were thereafter to be done by complainants and to be paid for upon the presentation of bills therefor, and in case Yerkes did not approve the bills as being the fair cost therefor, the 'same shall likewise be estimated by said M. K. Bowen.'"

The control of the railroad was surrendered to the appellee, as provided in the agreement, and a board of directors elected satisfactory to appellee. Appellants have finished the construction of the railroad as they agreed, and the appellee has paid to them, and on their account, a large sum of money, not less than \$400,000.

The bill of complaint of appellants, after setting out a full history of the organization and the efforts made to construct and equip said railroad, down to and including the making of the contract of July 26, 1897, between appellants and appellee, the substance of which has above been stated, concluded as follows:

"Your orators further show, that immediately upon the execution of said contract your orators turned over to said Yerkes and his agents the stocks and bonds in their possession, in accordance with the terms thereof,

and the possession of said railroad, although they continued to operate the same for a period, as provided in said contract. Various sums of money were paid to your orators, and your orators were expecting to go on with the provisions of said contract when they learned that M. K. Bowen, to whom there was assigned, under and by the terms of the said proposition and contract, the duty of ascertaining the cost of certain special work and the power house, no part of the cost of either said special work or said power house having yet been paid to your orators, had been employed by said Charles T. Yerkes as his agent and representative in the matter of estimating and reporting the cost and price to be paid for the special work and the power house under the terms of said contract, and instead of impartially and justly investigating the actual cost to your orators and their predecessors in interest of the matters and things so to be investigated and ascertained by him, he regarded himself, by virtue of such employment, as the agent and representative of said Charles T. Yerkes and bound to obey the instructions of the said Charles T. Yerkes therein, and openly confessed to your orators that he would return the cost at one-half or one-third the actual cost, if he was so instructed by said Charles T. Yerkes.

"Your orators further aver that they have not received or accepted anything on account of said contract since they became aware of the employment of said Bowen by said Yerkes, but straightway caused a notice to be given to said Bowen, and arranged, by stipulation with the attorney of said Charles T. Yerkes, that the said Bowen should take no action in the premises until further notice from the parties, which was done with the intention of investigating the rights of your orators in view of this extraordinary state of affairs, and seeing whether or not the matters in dispute could not be adjusted without the necessity of reference to said M. K. Bowen, and with the intention of preserving matters *in statu quo* until such

rights could be investigated and arrangements made, if possible, to protect the rights of your orators through other means, it being manifestly unjust and inequitable, as your orators are advised and believe, that they should be compelled to submit any matter to a person who has thus been employed by the said Charles T. Yerkes; that, notwithstanding the said stipulation and notice, the said Bowen, acting, as your orators believe, under the directions of the said Charles T. Yerkes, and as a means to induce your orators to submit to further exactions and injustice, disregarding the said stipulation, made a pretended report, without any examination of the vouchers of your orators or any attempt to investigate the cost of the matters so referred to him, said report fixing the sums, in many instances, at less than half what was actually due to your orators, under the terms of said agreement, had the said Bowen impartially discharged his duty and made any attempt to inform himself as to the actual cost of the matters so referred to him; that immediately upon the receipt of said report from said Bowen the attorney representing the said Yerkes notified the attorney of your orators that the mailing of said report was a mistake, that it should be re-called, and asked that the same be returned, which the complainants have done; that afterwards, in the negotiations looking to a settlement of the matter independently of the said Bowen, the defendants relied upon the valuations put upon the said items by the said Bowen, who has been, as your orators aver, and was soon after the execution of said contract, employed by said Charles T. Yerkes, and who has avowed himself the agent and representative of said Yerkes in procuring a settlement under the contract and proposition of July 26, 1897.

"Your orators further aver that in and by the terms of said contract payments were to be made on certain dates, and, among other things, payments were to be made to the Pullman Palace Car Company,—all of which

the said Yerkes has neglected and refused to do. And your orators further aver that they have demanded of said Yerkes the return to them of all the stocks and bonds by them delivered under and in pursuance of the said contract of July 26, 1897, together with the possession of the railroad, and have offered to re-pay to said Yerkes all sums received by them or paid by him for their account under and in pursuance of said contract; and your orators hereby and herein offer to pay to the said Charles T. Yerkes all sums that have been paid to them or for their account under and in pursuance of said contract of July 26, 1897."

CHARLES H. ALDRICH, for appellants.

KNIGHT & BROWN, for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

The only matter left uncertain by the contract of July 26, 1897, is the amount to be paid appellants for the "power house" and the "special work," which, by the terms of the contract, was to be determined by M. K. Bowen.

The ground for equitable relief relied upon in the bill is the alleged interference with the impartiality of Bowen by appellee. The bill cannot be maintained, in our opinion, on that ground, for two reasons:

*First*—The appellants have not placed the appellee *in statu quo*. The rule is well settled that when a party desires to rescind a contract upon the ground of fraud, it is his duty to act promptly and at once tender back what he has received under the contract. If he remain silent and proceed to complete the contract or in any way recognize the validity thereof after he has notice of the fraud, he will be held to have waived the objection and be conclusively bound by the contract. *Day v. Fort Scott Investment Co.* 153 Ill. 293; *Rigdon v. Walcott*, 141 id. 649; *Doane v. Lockwood*, 115 id. 490; *Buchenau v. Horney*, 12 id.

336; *Greenwood v. Fenn*, 136 id. 146; *Grymes v. Sanders*, 93 U. S. 55.

It is said in *Day v. Fort Scott Investment Co. supra*, (p. 304): "It is a familiar rule, and one well settled by the authorities, that where a party discovers that fraud has been practiced upon him in the making of a contract, it is his duty at once to repudiate the contract and tender back what he has received under the contract, so that the other party may be placed as nearly as possible in the same position he occupied before the contract was made."

In *Rigdon v. Walcott, supra*, we say (p. 660): "A contract into which a party has been induced to enter by the fraud of the other party is not void, but is only voidable at the election of the defrauded party. Until he has elected to rescind, and has performed such acts on his part as are necessary to work a rescission, the contract remains in full force, and he is entitled to no remedy which is not based upon the theory of its continued validity. It is a general rule, to which there are but few exceptions, that the restoration of the party against whom the relief is sought, or the offer to restore him, to the position which he occupied before the transaction complained of took place, is a condition precedent to the right to rescind. The right can be exercised only upon the terms of returning the consideration received, or, perhaps, under certain circumstances, of returning its value."

In *Doane v. Lockwood, supra*, it was said (p. 496): "Undoubtedly the law is, where a party has received any valuable consideration upon the sale of property he can not rescind the contract for fraud without first returning to or offering to return to the purchaser the consideration received, whatever it may be. The title of the fraudulent purchaser is subject to be divested, at the election of the seller, within any reasonable time after the fraud is discovered. When a sale is thus rescinded for fraud it is as though no sale of the property had been made."

In *Buchenau v. Horney*, *supra*, we said (p. 328): "A party cannot rescind a contract of sale and at the same time retain the consideration he has received. He cannot affirm the contract as to part and avoid the residue, but must rescind it *in toto*. He must put the other party in as good a condition as he was before the sale, by a return of the property purchased."

In *Greenwood v. Fenn*, *supra*, which was a bill to set aside a contract for the sale of land on the ground of fraudulent representations as to the quality of the land, we said (p. 158): "The rule on this subject is well stated in *Grymes v. Sanders*, 93 U. S. 55, as follows: 'Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent and continue to treat the property as his own he will be held to have waived the objection, and will be conclusively bound by the contract as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted.'"

At the time the contract was made between appellants and appellee the railroad was but partially completed. Large sums of money have since been expended by appellee in the completion thereof and in the payment of obligations assumed by him, and all the provisions of the contract have substantially been complied with by both parties, with the exception of those relating to the "power house" and "special work." We are of the opinion the appellants cannot rescind said contract, as, from the nature of the transaction and the necessary inferences which follow from the facts alleged in the bill, it appears they have heretofore failed, and it is impossible now for them to place the appellee in the position he occupied prior to and at the time of the making of the contract of July 26, 1897. Especially is this true as the railroad is owned by the Suburban Railroad Company,

a corporation, and not by appellee, and it is not a party to this bill.

The bill does not state when knowledge of the alleged fraudulent arrangement between appellee and Bowen came to appellants. All intendments being against the pleader, for aught that appears in this bill appellants may have known of such fraudulent arrangement before any part of said contract was executed. It is said in 2 Pomeroy's Eq. Jur. sec. 897: "All these considerations as to the nature of misrepresentations require great punctuality and promptness of action by the deceived party upon his discovery of the fraud. The person who has been misled is required, as soon as he learns the truth, with all reasonable diligence to disaffirm the contract or abandon the transaction, and give the other party an opportunity of rescinding it and of restoring both of them to their original position. He is not allowed to go on and derive all possible benefits from the transaction, and then claim to be relieved from his own obligations by a rescission or a refusal to perform on his own part. If, after discovering the untruth of the representations, he conducts himself with reference to the transaction as though it were still subsisting and binding, he thereby waives all benefit of and relief from the misrepresentations."

*Secondly*—The appellants have a plain, speedy and adequate remedy at law, and if anything is due appellants upon the "power house" or for "special work" the law will afford them complete redress, notwithstanding the alleged misconduct of Bowen. The law is too well settled to require the citation of authorities, that if the appellants have an adequate remedy at law, a bill in chancery will not lie to rescind said contract. We are of the opinion the appellants have an adequate remedy at law, notwithstanding the alleged fraudulent and corrupt agreement between appellee and Bowen.

Where the parties to a contract for labor in cutting stone make an architect umpire to settle all disputes,

and agree that his decisions will be final, and agree for the payment of extra work provided the architect shall certify to the amount due, they will be bound by the agreement, and unless the architect act in bad faith, refuse to act, or is prevented by some unforeseen and uncontrollable cause, no action can be maintained for extra work without his certificate, but if he acts in bad faith, refuses to act, or is prevented by some unforeseen or uncontrollable cause, suit may be brought. (*Fowler v. Deakman*, 84 Ill. 180.) Upon the sale of personal property, the price to be fixed by arbitrators, if the performance of the condition for a valuation be rendered impossible by the act of the vendee, the price of the thing sold must be fixed by the jury on a *quantum valebat*. (*Humaston v. American Telegraph Co.* 20 Wall. 20.) If the performance of the condition for a valuation be rendered impossible by the act of the vendee, the price of the thing sold must be fixed by the jury on a *quantum valebat*. (Benjamin on Sales, p. 430.)

*Hood v. Hartshorn*, 100 Mass. 117, was a suit upon a covenant in a lease, by which it was agreed that at the expiration of the term the buildings erected by the lessee on the demised premises should be appraised by three disinterested men, to be chosen, one by the lessor, one by the lessee and the third by the two thus appointed, and that the lessor should purchase the buildings at the price fixed by such appraisers. Certain persons were appointed appraisers, who refused or neglected to act, and the lessor refused to join in the selection of others to act in their stead. It was held that the obligation of the lessor to pay for the building was not entirely dependent upon the making of an appraisal, but that the appraisal was to be regarded as a mere method of ascertaining the price to be paid for them; that while the lessor was bound to do all that was reasonably in his power to procure the stipulated appraisal, yet if he had



done so and failed, he was entitled to recover the value of the buildings to be assessed by a jury.

*Phippen v. Stickney*, 3 Metc. 384, was a suit upon an agreement under seal, by which the defendant covenanted to sell and convey to the plaintiff certain lands which he was about to purchase at auction, on such terms as three persons, specifically designated, should decide to be just and reasonable. But two of the arbitrators named agreed to an award, the third dissenting and refusing to sign it. The defendant having refused for that reason to perform the award, suit was brought to recover a penalty for default, fixed by the agreement, and the court, in sustaining the plaintiff's right to recover, say (p. 389): "In a case like the present, if it appears that the plaintiff has done all in his power to procure an award, fixing the amount to be paid by him in pursuance of the terms of the contract, we do not think that the act of any one of the persons thus selected as arbitrators, in refusing to concur with his associates in fixing the sum to be paid, should operate to divest the rights of the plaintiff arising under the contract."

Furthermore, this is not a case for rescission. The valuation of the "power house" and "special work" by Bowen is a small matter when compared with the entire subject matter covered by the contract of July 26, 1897. Appellee cannot be placed *in statu quo*, and the rights of appellants, if their contention is correct as to the facts, can readily be settled in a court of law and satisfied by a money judgment.

We are of the opinion, therefore, that the judgment of the Branch Appellate Court should be affirmed.

*Judgment affirmed.*

SARAH M. LANPHIER

v.

THOMAS S. DESMOND.

*Opinion filed October 19, 1900.*

1. MORTGAGES—*trust deed has no force until delivery, though recorded.* A trust deed, although duly executed, acknowledged and recorded, has no force as a conveyance until it has been delivered.

2. SAME—*encumbrancer is bound by record of conveyances prior to delivery of mortgage.* One who receives a trust deed from the grantor therein is bound by the record of conveyances in such grantor's apparent chain of title, and hence takes subject to a conveyance of the property by warranty deed recorded after the trust deed was recorded but before it was delivered.

3. SAME—*effect of payment of debt collaterally secured by a trust deed.* Upon the payment, by the grantor in a recorded trust deed, of the debt for which such deed and the note purporting to be secured thereby were held as collateral, and the return of the deed and note to him, the lien of such deed is extinguished as against one to whom the grantor, prior to such payment, had conveyed his interest in the property by a recorded deed of warranty.

*Desmond v. Lanphier*, 86 Ill. App. 101, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. ELBRIDGE HANEY, Judge, presiding.

PECK, MILLER & STARR, for appellant.

CHYTRAUS & DENEEN, CHARLES H. HAMILL, and EDWIN WHITE MOORE, for appellee.

Per CURIAM: The following statement of the case was made and opinion rendered by the Appellate Court:

"Appellee, Sarah M. Lanphier, claiming to be the owner of a note of \$3500, dated August 20, 1888, made by Reuel W. Bridge, payable to his order and by him endorsed, due one year after date, and secured by a trust deed of the same date made by said Bridge and wife to James Mor-

gan, trustee, and Charles Morgan, as successor in trust, conveying eighteen lots in Cheltenham, Cook county, Illinois, and which was recorded September 25, 1888, filed her bill in the circuit court of Cook county on March 20, 1897, against Thomas S. Desmond, said Bridge and others, to foreclose said trust deed because of the alleged non-payment of a balance claimed to be due on said note of \$2100 and interest. No defense was made by any of the defendants, although they answered the bill, except Desmond, who answered, in substance denying that Bridge was indebted in any amount on said note; that it was made to evidence or secure any *bona fide* indebtedness existing at the time it was made; that said note was at any time delivered to said Lanphier, and alleging that if it was delivered to her it was not so delivered until long after the maturity thereof and after Desmond had become the owner of the real estate described in the trust deed. The answer admits the execution and recording of the trust deed, but alleges that there was no consideration therefor, and denies that the trust deed was at any time prior to the maturity of the note delivered to any *bona fide* holder, and denies that it ever became effective as a lien as against said Desmond. The answer also admits the charge in the bill that he, said Desmond, has an interest in said real estate, and alleges that he is the owner thereof in fee simple, and that the same is not subject to the lien of said trust deed. Replications to the answers were filed. Desmond also filed a cross-bill against said Lanphier and the other defendants to the original bill, in which is alleged, in substance, the same matters set up in his answer, and the details as to how he became the owner of the premises in question, and praying that said trust deed be decreed to be surrendered and canceled and declared not to be a valid or existing lien on said premises. The defendants to said cross-bill answered the same, to which replications were filed and the cause referred to a master to take proof and report

his conclusions. The master reported, recommending a decree of foreclosure of said trust deed for the amount found by him to be due thereon, viz., \$3703, and that the cross-bill of said Desmond be dismissed for want of equity. Objections were filed to the master's report by said Desmond, which were ordered to stand as exceptions thereto, and upon a hearing before the chancellor the master's report was confirmed and a decree of sale of the real estate in question, except of three lots released by the trustee, hereinafter referred to, was entered for the amount found due by the master, but no disposition is made in the decree of the cross-bill of Desmond.

"It appears from the record that after the filing of the master's report and objections thereto, and on the 16th day of December, 1898, counsel for said Desmond moved the court for leave to dismiss his cross-bill, which motion was continued. Afterwards, and on the same day of the entry of the decree of foreclosure, the following separate order was entered by the court, viz.: 'On motion of solicitor it is ordered that the cross-bill of Thomas S. Desmond is hereby dismissed out of this court at the cost of cross-complainant.' The appeal in this case is prosecuted by Desmond from the decree of foreclosure, and none of the other parties to the litigation, except said Lanphier, have appeared in this court.

"From the evidence reported by the master the following facts, in substance, appear, to-wit: In March, 1884, by an agreement between one Bartow A. Ulrich and said Bridge, the latter took the legal title of certain real estate, including the premises in question, in trust, upon the understanding that said Ulrich should receive one-half of the final profits which might result in dealing in said real estate and the said Bridge the other half of such profits. In March, 1884, and after Bridge took said title, and as a part of the same transaction, Ulrich sold one-half of his interest in the profits to be derived from said real estate to Desmond, for which the latter gave to

Ulrich a note of the Franklin Printing Company of \$3000, dated December 19, 1883, payable to the order of Desmond in one year, and by him endorsed, the note being executed by Desmond as president of the printing company, and also by the secretary of the company. This note was immediately transferred by Ulrich to Bridge in consideration of Bridge conveying a quarter interest in the profits of said real estate to Victoria Ulrich, a daughter of said Bartow A. Ulrich, and a further payment of \$1500 by said Bridge to said Bartow A. Ulrich. Said note of the printing company was also secured by a chattel mortgage of that company on certain personal property. As the result of this transaction Bridge held the title in fee simple of said real estate in trust, to pay the profits arising from dealing therein, one-quarter to each Bartow A. Ulrich, Victoria Ulrich, said Desmond, and to retain one-quarter for himself.

"When said printing company note became due it was owned by Bridge, who, by agreement with Desmond, renewed it by a new note of the printing company dated December 19, 1884, payable to the order of Desmond on June 19, 1885, and endorsed and guaranteed by Desmond. As collateral to this last note Desmond also made and delivered to Bridge his individual note dated December 18, 1884, for \$2000, payable to Bridge, one-half on March 1, 1885, and the balance on April 1, 1885, with interest at eight per cent. per annum, to secure which Desmond also made and delivered to Bridge a chattel mortgage of the same date, conveying two buildings on leased ground. No payment was ever made by Desmond to Bridge upon this note of \$2000 or to any one else, nor has he ever been asked to make any payment thereon. Bridge claims to be still the owner of the note and mortgage, but that they have been lost or misplaced. They were not produced on the hearing.

"When the note of the printing company which became due June 19, 1885, matured, Bridge took a third

note of the printing company, executed by Desmond as president and C. E. Page as secretary, for the sum of \$3000, dated June 19, 1885, payable to the order of Bridge, \$1000 in three months, \$1000 in six months, \$900 in nine months and \$100 in twelve months, respectively, after date, with interest at eight per cent per annum, payable quarter-yearly, and providing that default in any installment should mature the whole note, if the holder should so elect. This last note was also secured by a chattel mortgage of the printing company to Bridge, and is endorsed with divers payments of interest up to March 19, 1886, and payments of principal of \$765 and \$204.34, stated to be proceeds of sale of property covered by the mortgage, and a further endorsement as follows: 'Amount due as of June 9, 1886, \$2074.47.'

"August 20, 1888, Bridge made his note for the sum of \$3500 of that date, payable one year thereafter, to his own order, and endorsed by him, bearing interest at seven per cent until maturity and eight per cent after maturity, and to secure the same he, together with his wife, made and acknowledged a trust deed of the same date, conveying to James Morgan, as trustee, eighteen lots, being part of the property so held in trust by him. This trust deed was recorded September 25, 1888. At divers times thereafter Bridge used this note and trust deed as collateral to secure loans of money and indebtedness by him to divers persons, all of which loans he paid, and after the payment of each the note and trust deed were returned to him. This note and trust deed were in his possession in the month of May, 1894, and did not, at that time, secure any loan to Bridge or indebtedness by him or by any one else. The note is endorsed with two payments,—one of \$500, July 20, 1889, and one of \$900, December 31, 1889,—and also shows endorsements of interest paid thereon up to January 1, 1891, and extensions of payments thereon from time to time to January 1, 1891.

"February 9, 1889, there was executed by the said Ulrich, his daughter and Desmond, a statement in writing purporting to show the final profits and interest of each of the parties in said real estate held by Bridge in trust. This statement recites that the share of Desmond in said profits was \$4718.63, and that he was entitled to have conveyed to him such parts of said real estate clear of encumbrance, subject to taxes and assessments of 1888, as he might select, at the schedule prices of the real estate fixed by said statement, up to the amount of said profits coming to him. Bridge endorsed thereon his written assent to this statement, and thereby agreed on his part, as trustee and individually, to carry it out, except as to certain lots not now in question, which had been sold. Thereafter, on February 18, 1889, Desmond notified Bridge, in writing, that he had selected eighteen lots, the total value of which, at the schedule prices by said statement, amounted to \$4500, and demanded of Bridge a conveyance thereof according to his agreement, and that he pay the balance of Desmond's share of said profits, to-wit, \$218.63, in cash. The lots so selected by Desmond were the same lots conveyed by Bridge in the trust deed to Morgan of August 20, 1888.

"Thereafter, on March 21, 1889, in compliance with the demand of Desmond, Bridge and wife made and delivered to Desmond a deed of conveyance of the lots so selected by Desmond. This deed is made out upon a printed form of deed commonly known as the statutory form of quit-claim deed which is described in the Revised Statutes of Illinois concerning conveyances. In the deed from Bridge to Desmond the printed word 'quit-claim' was erased with a pen and the word 'warrant' written over it in the handwriting of Bridge, so that the deed as executed, acknowledged and delivered read, that the grantors (naming them) 'convey and warrant' to Thomas S. Desmond 'all interest in the following described real estate' (describ-

ing the same). This deed was recorded March 23, 1889. At the same time this deed was made, Bridge and Desmond signed an agreement which recited, in substance, that said deed was delivered in full settlement and discharge of all claims and demands of Desmond against Bridge in any way connected with or arising out of the real estate named in said agreement of February 9, 1889, as far as said Desmond was concerned; that there was 'still due from Bridge to Desmond \$218.64,—a money claim which, with the claim of said Bridge against said Desmond for balance of indebtedness arising out of the Franklin Printing Company debt, are to be settled hereafter.'

"On the hearing, Bridge testified, when asked why the word 'quit-claim' was stricken out of the deed and the word 'warrant' inserted in its place, that he did it to warrant the interest which he had on the day that he drew or made the deed. Desmond testified that when he received the deed he supposed that the land was free and clear from all encumbrances, and did not know of the existence of the trust deed to Morgan until a month or more after he had received his deed from Bridge, and that after he found out about the trust deed, at his request Bridge made the payment of \$500, which was endorsed upon the note secured thereby, under date of July 20, 1889, by means of which Bridge secured a release from the trustee of three of the lots, which release was delivered to Desmond. This release contained the following clause, viz.: 'This release in nowise to affect or lessen the lien of the said trust deed on the balance of the property thereby conveyed.'

"Commencing in the year 1884, and continuing up to the latter part of 1895, the appellee placed in Bridge's hands different sums of money from time to time, to be loaned by him as her agent. The amount so placed with him by appellee, together with accruing interest, after making all deductions to which Bridge was entitled, was,



on October 10, 1895, \$7213.65. Appellee kept a box in Bridge's office, where, it seems, he was in the habit of placing her securities for money which he loaned for her, but she never looked among the papers to see what the securities were until the latter part of 1895. Bridge testifies that in May, 1894, when he was indebted to appellee more than the sum of \$2100 and the accrued interest upon the note secured by the Morgan trust deed of August 20, 1888, he placed said trust deed and the note secured thereby in appellee's box of securities then in his office, and for the purpose of transferring them to her as a security for his debt then owing her. Appellee testified that she never saw the note and trust deed prior to December, 1895; that she could not tell when she first obtained them; that the first actual knowledge she had of them was in the latter part of 1895, and that they were placed in her box without her knowledge. She also testified that she never loaned Bridge any money; that she left her money with him in small or large amounts; that he was to collect the interest and let it go as principal, and that she did not collect the interest. This note, so placed by Bridge among appellee's securities, had matured more than three years prior to that time. Appellee parted with no right or claim which she had against Bridge, nor did she pay any money for the note and trust deed. The property secured by the trust deed was vacant and unoccupied at the time of the making and recording of the deed from Bridge to Desmond, and also in 1894, when the note and trust deed were placed in appellee's box of securities by Bridge, and also in 1895, when appellee first had knowledge of the same."

Opinion:

"From the statement preceding this opinion it appears that at the time (May, 1894,) the trust deed to foreclose which appellee filed her bill was acquired by her, there was no existing *bona fide* debt of its maker, Bridge, or of any one else, secured by it. It, and the note purporting

to be secured thereby, had previous to that time, on different occasions, been used by Bridge as collateral to secure divers claims owing by him, but when it passed into the hands of appellee the transfer was from Bridge, and not from any one with whom he had hypothecated them or from any *bona fide* owner or holder, then, and not till then, as to appellee, could the trust deed take effect. That was the time of its delivery. It then for the first time, in favor of appellee, became an existing encumbrance upon the real estate conveyed by it, and as to her had the same effect and validity, and no other, than if Bridge on that day had made a new trust deed and note for the same amount and delivered them to her. No deed is complete without delivery. 1 Jones on Mortgages, secs. 84, 539; 2 id. sec. 948; *Partridge v. Chapman*, 81 Ill. 137; *Weber v. Christen*, 121 id. 91; *Sullivan v. Eddy*, 154 id. 199; *Skinner v. Baker*, 79 id. 496; *Schultze v. Houfes*, 96 id. 335; *Herber v. Thompson*, 47 La. Ann. 803; *Underhill v. Atwater*, 22 N. J. Eq. 21; *Purser v. Anderson*, 4 Edw. Ch. (N. Y.) 18; *Spencer v. Fredendall*, 15 Wis. 736.

"Mr. Jones, in section 84, *supra*, says: 'Without delivery there is no mortgage. It takes effect only from the time of its delivery.' In section 539 the same author says: 'Delivery is another incident necessary to giving effect to the mortgage, even as between the parties to it. Although the deed be recorded, if it has not been delivered, or the delivery was unauthorized, a subsequent conveyance by the mortgagor or a subsequent judgment against him will take precedence.' Section 948 the author says: 'The condition of a mortgage having been performed, a subsequent encumbrancer has the right to avail himself of the advantage, and not to be postponed to equities newly created, which, in fact, are subsequent to his own claim.' In the same section the author also says that when the original debt for which a mortgage has been given has been satisfied, 'the original mortgage cannot, as against third persons especially, be dealt with

as a subsisting security.' The authorities cited by the author in support of these propositions sustain him.

"In the *Partridge case*, *supra*, the Supreme Court held with regard to a mortgage which was executed by the owner of real estate to a person who was not present by himself or agent, and left the same for record, with directions, when recorded, to be sent to the mortgagee by mail, which was done, there was no delivery until it was mailed, and that a subsequent purchaser who took actual possession before the mortgage was delivered took a title superior to the mortgage.

"In the *Weber case*, *supra*, it was held that the acknowledging and recording of a deed without the knowledge or consent of the grantee did not amount to a delivery. To the same effect is the *Sullivan case*, *supra*.

"In the *Skinner case*, *supra*, the court says: 'Delivery is an essential and indispensable element to the conveyance of the lands by deed, for the reason that a deed takes effect only from the delivery.'

"In the *Underhill case*, *supra*, the New Jersey court holds that a 'mortgagor may again issue or negotiate a mortgage which has been satisfied, paid off or delivered to him, except as against intervening securities. The delivery of any instrument by the grantor gives it efficacy, and if he takes a paper executed and once used for another purpose, its re-delivery gives it again vitality.'

"In the *Schultze case*, *supra*, it was held that the lien of a trust deed, though recorded, takes effect only from the time the money is in fact received, as against the equities of a third person under a prior unrecorded mortgage or trust deed; that it made no difference that the intention was that upon the payment of the money the title should relate back to the time of the recording of the deed, and that while such an intention, as between the parties themselves, might be carried out by the court, when the rights of third persons intervene the intention of the parties must yield to the law.

"In the *Purser case*, *supra*, it was held that a mortgage which had been paid could, for a valuable consideration, be kept alive for other purposes, but not as against the rights of creditors or third persons which had intervened. This ruling was made with reference to a second mortgage by the same mortgagor and an assignment for the benefit of creditors.

"In the *Spencer case*, *supra*, the Supreme Court of Wisconsin held that a husband could not keep alive, for the purpose of securing a new debt, as against his wife, a mortgage on the homestead which had been paid, because it was, in effect, making a new mortgage, and could not be valid, under the statute regarding homesteads, without the signature of the wife.

"Long prior to the time appellee acquired this trust deed and note, and on March 21, 1889, Bridge had conveyed and warranted to appellant all his (Bridge's) interest in the real estate in question, which was the legal title subject to the lien of this trust deed then outstanding in the hands of one of Bridge's creditors. This conveyance passed Bridge's title to appellant, was recorded in the recorder's office of Cook county on March 23, 1889, and was, therefore, under the recording laws of this State, notice to all subsequent purchasers or encumbrancers claiming through Bridge. Hurd's Stat. 1897, chap. 20, sec. 21; *Kerfoot v. Cronin*, 105 Ill. 609; *Willoughby v. Lawrence*, 116 id. 11; *Schultze v. Houfes*, 96 id. 335; *Cunningham v. Thornton*, 28 Ill. App. 58, and cases cited.

"The title having passed from Bridge to appellant, Bridge had none to convey, and could convey no title in May, 1894, when he turned over to appellee the old trust deed, which then, the time of its delivery to her, became, as between her and Bridge, a valid and existing deed. As to appellant, when this trust deed came back into the hands of Bridge, the debt for which it was a security having been extinguished by him, it became a nullity in equity—was the same as if it had never been made.

Appellant's deed then being of record, took precedence of all instruments or conveyances purporting to affect the title of the real estate conveyed by it which could be made by Bridge. As we have seen, the old trust deed could have no greater force or effect than if it had been signed on the day it was delivered to appellee. That the recording of a document which had no existence as a deed could give it no validity as a deed is elementary.

"These facts, in our opinion, are controlling and conclusive in the decision of this case, and all other matters shown by the record are either immaterial or of no consequence, as are also the various contentions of the learned counsel in their arguments as to the law and facts governing the case. Except as hereinafter referred to, we deem it unnecessary to mention specifically the numerous points made by appellee's counsel in support of the decree.

"It is claimed for appellee,—and several cases are cited to support the contention,—that she is not required to take notice of the registry of the deed by Bridge to appellant, it being recorded subsequent to the date of record of the trust deed in question. An examination of the several cases cited (including *Miller v. Larned*, 103 Ill. 562, which seems to be principally relied on,) shows that the facts and questions to be decided by the court in these cases were wholly different from the case at bar. These cases, because of the difference in their facts, are not applicable to the case of a trust deed which, like the one here in question, first had its existence, as between appellee and Bridge, long after the record of the deed from Bridge to appellant, and for which appellee parted with no right and paid no consideration. The registry laws have application to subsequent purchasers and encumbrancers. Appellee is an encumbrancer, and, in a sense, a purchaser subsequent to the record of appellant's deed. She is bound by the record of conveyances in the apparent chain of title from the grantor in her trust deed. The

deed to appellant being of record, is as much a notice of his title, as against Bridge, as if appellant had been in possession of the lots when the trust deed was transferred to her. 1 Jones on Mortgages, secs. 458, 710; *Schultze, Kerfoot and Cunningham cases, supra*.

"It is further claimed that appellant, by obtaining the release from Bridge of certain lots covered by the trust deed, which release stated that it should in nowise affect the lien of the trust deed on the remainder of the property thereby conveyed, acknowledged the validity of the trust deed and cannot now be heard to deny its validity. The trust deed was then outstanding as security of a debt due by Bridge, and was a lien which appellant could not then question as against Bridge's then creditor, who was secured by it. When Bridge extinguished the debt, as he afterwards did, that was the end of the lien of the trust deed as to appellant.

"It is also claimed that the dismissal of appellant's cross-bill, not purporting to be without prejudice, is therefore, for want of equity, *res judicata* and a bar. We think a consideration of the whole record shows that the dismissal was the voluntary act of appellant at a time when he had a perfect right to dismiss his cross-bill without the consent of the defendants thereto, and is in no way an adjudication against appellant. The Chancery act (sec. 36, chap. 22, Rev. Stat.) has no application to this case.

"The decree of the circuit court is reversed and the cause remanded, with directions to enter a decree dismissing appellee's bill for want of equity, at her costs. She will also pay all costs in this court."

The foregoing opinion by Mr. Justice WINDES, showing the just grounds upon which the judgment in the case should be based, is adopted as the opinion of this court.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

ALICE PARTRIDGE, Exrx.

v.

MARY S. STEVENS *et al.**Opinion filed October 19, 1900.*

1. APPEALS AND ERRORS—*proviso to section 8 of Appellate Court act construed.* The proviso to section 8 of the Appellate Court act, that "in all actions where there was no trial of an issue of fact in the lower court, appeals and writs of error shall lie from the Appellate Court to the Supreme Court where the amount claimed in the pleadings exceeds \$1000," merely authorizes resort to the pleadings in such actions to determine the amount involved in case of final judgment by the Appellate Court.

2. SAME—*appeal does not lie if Appellate Court's judgment is not final.* A judgment of the Appellate Court remanding the cause "for such other proceedings as to law and justice shall appertain" is not a final judgment, and no appeal lies therefrom notwithstanding the proviso to section 8 of the Appellate Court act.

*Stevens v. Partridge*, 88 Ill. App. 665, appeal dismissed.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Effingham county; the Hon. S. L. DWIGHT, Judge, presiding.

R. C. HARRAH, S. F. GILMORE, and CALLAHAN & JONES, for appellant.

W. B. WRIGHT, WOOD BROS., and E. N. RHINEHART, for appellees.

Mr. CHIEF JUSTICE BOGGS delivered the opinion of the court:

This was an action in debt by appellees, against appellant. The trial court adjudged the declaration to be obnoxious to a demurrer and entered judgment against plaintiffs for costs. On appeal the Appellate Court for the Fourth District reversed the judgment of the circuit court, and ordered the cause be remanded "for such other

187	388
192	1158

187	388
197	327

187	388
200	1186

and further proceedings as to law and justice shall appertain." This is an appeal sought to be taken from said judgment of the Appellate Court.

The appeal must be dismissed, for the reason the judgment of the Appellate Court that the judgment of the circuit court be reversed and the cause be remanded for such other and further proceedings as to law and justice shall appertain is not a final, appealable judgment. *Buck v. Hamilton County*, 99 Ill. 507; *Anderson v. Fruitt*, 108 id. 378; *International Bank v. Jenkins*, 109 id. 219; *Chicago and Northwestern Railway Co. v. Andrews*, 148 id. 27; *Gade v. Forest Glen Brick and Tile Co.* 158 id. 39; *Dickinson v. Livingston*, 168 id. 198.

There is no force in the suggestion the final proviso to section 8 of the act entitled "An act to establish Appellate Courts," approved June 2, 1877, (Hurd's Stat. 1899, par. 25, p. 525,) as amended by the act of June 6, 1887, confers the right of appeal from the judgment entered herein by the Appellate Court. Said proviso reads as follows: "*And provided further*, that in all actions where there was no trial on an issue of fact in the lower court, appeals and writs of error shall lie from the Appellate Court to the Supreme Court where the amount claimed in the pleadings exceeds \$1000." The proviso was added to the section for the purpose of establishing the rule for determining whether the sum or amount involved was sufficient to entitle the party to prosecute an appeal in actions at law wherein the Appellate Court had entered final judgment but in which no trial had been had in the trial court on the issues of fact in such cases. Prior to the adoption of the proviso the amount claimed in the pleadings could not be considered in order to determine whether this court could entertain jurisdiction of a cause which had been finally disposed of in the Appellate Court. (*Piper v. Jacobson*, 98 Ill. 389.) The proviso under consideration served no other purpose than to authorize resort to be had to the pleadings in order to ascertain



the amount involved in the class of cases to which it applied, and to invest this court with jurisdiction of appeals from final judgments entered in the Appellate Court in such cases if the amount claimed in the pleadings exceeded \$1000. It has no potency to authorize appeals from other than final judgments.

*Appeal dismissed.*

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NICOLAUS DRACH *et al.*

v.

ROSINA KAMBERG *et al.*

*Opinion filed October 19, 1900.*

1. APPEALS AND ERRORS—*that one of subscribing witnesses acted as proponents' counsel is not ground for reversal.* That one of the subscribing witnesses to a will acted as one of the solicitors for the proponents on contest is not of itself ground for reversing a decree sustaining the will, although such practice is not to be approved.

2. EVIDENCE—*what will not sustain charge of fraud in execution of will.* A charge that the pencil draft of a will was changed after leaving the testator's hands is not sustained, where the evidence shows that before signing the will the testator carefully compared it with his pencil draft, checked each item and expressed himself as satisfied with the will as prepared.

APPEAL from the Superior Court of Cook county; the Hon. PHILIP STEIN, Judge, presiding.

VOCKE & HEALY, and S. P. DOUTHART, for appellants.

J. J. HOCH, and EDWARD F. COMSTOCK, for appellees.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

Appellants filed their bill seeking to have set aside the last will of William Drach, Sr., deceased, of Chicago, on the ground of mental incapacity, fraud and undue influence. Issues being joined, the cause was tried by

a jury, who returned a verdict sustaining the will. The verdict being set aside and the cause again being tried, a similar verdict was returned, together with answers to special interrogatories, finding (1) that at the time the testator executed the instrument in question he was of sound and disposing mind; (2) that said execution was not induced by undue influence; and (3) that there was no fraud, directly connected with the execution of the will, practiced upon the deceased. A motion for a new trial being overruled, a decree was entered finding that the will in question had been rightfully admitted to probate and dismissing complainants' bill, from which decree this appeal is prosecuted.

The will in question was executed on the 28th day of December, 1896, in the presence of James G. Hoch, the attorney who drew the will and who is a reputable lawyer of Chicago; of M. Bensinger, who is the president of a well known business firm, he and Hoch being the subscribing witnesses; and of William Drach, Jr., a nephew of the deceased, who is referred to in a pencil draft made of the will by the testator some months before, as living at 2014 Poplar street, Philadelphia, and who is by the will in question, and also by the terms of the pencil memorandum prepared by the deceased, given the bulk of the testator's estate, consisting principally of real estate in the city of Chicago, the total value of which was about \$20,000. The will was made some ten days before the testator's death, and a careful reading of the record is convincing, while there is a conflict of evidence as to the degree of mentality possessed by the testator on or about the time he executed the will in question, that the jury were fully warranted in their finding.

It is clear the testator had bestowed considerable thought during the six months prior to his death as to what disposition he would make of his property. He had written his sister, in Philadelphia, (the mother of William Drach, Jr.,) in October, asking about her son and as to

his character, and saying he had been favorably informed as to his honesty and industry, and expressing an intention of leaving him some property. He writes to her again on November 14, 1896, and again mentions William and his desire to give him some of his property. On December 11, 1896, he writes to William, his nephew, and in this letter mentions his will and his intended disposition of his property, and while he does not state in so many words, he implies an intention of leaving him his property. In all these letters the writer seems to have a clear understanding and recollection of what his property consists, of his needs and desires, and of other relatives, for whom he evinces a dislike, and gives as a reason that he had lost money through them.

While it was William, Jr., who took the pencil memorandum to Mr. Hoch to have him put it in shape as a will, both Hoch and Bensinger testify the deceased took the will as drawn, and his own memorandum, to the window, sat down and carefully compared and checked off each item,—and these pencil marks still remain on the pencil memorandum introduced in evidence and incorporated in the record,—and after expressing himself satisfied therewith, he handed the will, as prepared, back, and said, "I believe you have covered it all," and asked that ink be brought, and signed it. Conversation followed, in which he expressed a dislike for his Chicago relatives and in which he talked rationally. The claim that the pencil draft was changed after leaving the deceased's hands is not borne out by the evidence, and the proof of fraud in the execution of the will fails.

Complaint is made of the giving and refusing of instructions, but as there are no instructions shown in the record, and neither record nor abstract shows any exception taken to the giving or refusal of any of the instructions, no error can be assigned in this court thereon.

Complaint is made that James G. Hoch, the subscribing witness, who testified as a witness, acted as one of

the solicitors for the proponents of the will on the trial of the cause. Courts have always discountenanced the practice, and the urgency should be great where a witness should act as counsel, but in the absence of other facts and circumstances it is not ground for reversal. (*Morgan v. Roberts*, 38 Ill. 65.) In this case no objection was made to the testimony of Hoch, or motion to exclude, or any exception taken.

The case appears to have been carefully tried, and we find no error in the record, and the decree of the superior court of Cook county is affirmed.

*Decree affirmed.*

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WILLIAM L. WALLEN

v.

SILAS M. MOORE.

*Opinion filed October 19, 1900.*

This case is controlled by the decision in *Wallen v. Moore*, (*ante*, p. 190.)

*Wallen v. Moore*, 88 Ill. App. 287, affirmed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. FARLIN Q. BALL, Judge, presiding.

GEORGE E. LEONARD, for appellant.

ULLMANN & HACKER, for appellee.

PER CURIAM: The question involved in this case is the same as the question decided in the case of *Wallen v. Moore*, (*ante*, p. 190.) The decision in that case governs and controls the decision in this case. Accordingly, the judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

## THE FIRST NATIONAL BANK OF HAYS CITY

v.

ELLEN VEST *et al.**Opinion filed October 19, 1900.*

1. APPEALS AND ERRORS—*appeal should be taken to Appellate Court in creditor's bill proceeding.* An appeal from a decree in a proceeding by a judgment creditor to have set aside a conveyance alleged to have been made by the judgment debtor for the fraudulent purpose of defeating the enforcement of the judgment, lies to the Appellate Court, since no freehold is involved.

2. HOMESTEAD—*homestead does not attach after judgment.* A judgment debtor cannot acquire a homestead as against the judgment, after the judgment has become a lien upon the property.

3. SAME—as against creditor's bill, homestead must be claimed by answer. In order to claim a homestead as against a creditor's bill the right must be set up in the answer.

WRIT OF ERROR to the Circuit Court of Champaign county; the Hon. FRANCIS M. WRIGHT, Judge, presiding.

WHITE & DOBBINS, for plaintiff in error.

LEWIS & LEWIS, and THOMAS J. SMITH, for defendants in error.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

This is a bill, filed on September 14, 1898, in the circuit court of Champaign county by the plaintiff in error against the defendants in error, alleging the recovery by the plaintiff in error at the March term, 1897, of the court, of a judgment against the defendant in error S. L. Vest for the sum of \$355.50 together with \$5.30 costs of suit, and that, such judgment remaining unsatisfied on May 26, 1897, an execution was sued out on that day, and afterwards, on July 20, 1897, returned by the sheriff unsatisfied. The return as endorsed on the execution was: "The within execution returned unsatisfied, no property found in my county on which to levy, this 20th day of July, 1897."

187	889
204	144
109a	52
187	889
215	189

The bill then alleges that, after the debt for which the judgment was recovered had accrued, Vest was the owner in fee simple of two sub-lots in a certain addition to the city of Urbana, and that, thereafter on February 24, 1896, he conveyed said sub-lots to his wife, Ellen Vest. The bill charges that there was no consideration for this conveyance, and that it was made for the purpose of shielding said property from sale on execution upon any judgment the plaintiff in error might thereafter recover against S. L. Vest. The prayer of the bill is, that the deed, alleged to have been so fraudulently made by S. L. Vest to his wife, Ellen Vest, be declared null and void against the plaintiff in error, and that the lands thereby transferred be subjected to the execution of the plaintiff in error.

From the foregoing statement of the facts it appears, that this is a bill, filed by a judgment creditor for the purpose of setting aside a conveyance alleged to have been made by the judgment debtor for the fraudulent purpose of defeating the enforcement of the judgment. Where such a bill is filed, no freehold is involved, and the decree of the court should go to the Appellate Court for review and not to this court. Hence, the point made by the defendants in error, that this court has no jurisdiction, and that the writ of error should be dismissed, is well taken. In *Moshier v. Reynolds*, 155 Ill. 72, we said: "A bill filed in aid of an execution, or as a creditor's bill, seeking to set aside an alleged fraudulent conveyance made by a judgment debtor and subject the lands to sale for the payment of the judgment indebtedness, does not involve a freehold." (See, also, *Hupp v. Hupp*, 153 Ill. 490; *Blackman v. Preston Bros.* 119 id. 240).

It is contended by the plaintiff in error that a homestead estate is involved here, and that, inasmuch as the estate of homestead is a freehold, this court should entertain jurisdiction of the case. An estate of homestead is not involved in this litigation. The only material question before the court below was, whether the conveyance,

made by the judgment debtor, S. L. Vest, to his wife, was made in fraud of the rights of creditors and subject to be set aside upon that ground. The property in question consisted of a lot with a building upon it, the lower part of which was used as an office or store, and in the upper part of which were some sleeping rooms. There is some evidence to the effect that, in May, 1898, Vest and his wife moved into some of these upper rooms and occupied them. But this occupation occurred more than a year after the lien of the judgment is alleged to have attached. After a judgment has become a lien upon land, the judgment debtor cannot acquire a homestead as against the judgment. (*Willard v. Masterson*, 160 Ill. 443; *Zander v. Scott*, 165 id. 51).

In addition to this, there was nothing in the pleadings, either the bill or answer, upon the subject of homestead. No claim of homestead was set up in the answer. To claim a homestead as against a creditor's bill, the right must be set up in the answer. (*Lofquist v. Errickson*, 152 Ill. 456).

Counsel for the plaintiff in error refer, in support of their contention that the estate of homestead is involved, to the cases of *Snell v. Snell*, 123 Ill. 403, and *Stodalka v. Novotny*, 144 Ill. 125. But these cases have no application to such a state of facts as exists in the case at bar. In the *Snell case*, a bill was filed expressly claiming an estate of homestead in certain premises, and praying that the same be set off and assigned to the complainant. In the *Stodalka case*, a bill was filed to reform a contract for the sale of a homestead by the insertion therein of a release of that right and an acknowledgment, and then to enforce a specific performance of the contract; and it was there held that a court of equity had no power so to reform a contract.

An order will be entered dismissing the writ of error; but leave is given to the plaintiff in error to withdraw the record, abstracts and briefs.

*Writ dismissed.*

DANIEL H. CUSACK

v.

IDA BUDASZ *et al.**Opinion filed October 19, 1900.*

1. **SPECIFIC PERFORMANCE**—*when alleged uncertainty of contract is removed.* Alleged uncertainties in a contract for the exchange of properties will be regarded as removed, on appeal, in the absence of a certificate of evidence, where the matters complained of are sufficiently set out in the bill, and the court, after hearing evidence, has found in its decree that the allegations are true.

2. **PRACTICE**—*when reference to the master to state account is unnecessary.* Where the ascertainment of the amount due under a contract for the exchange of properties is a simple matter it is not necessary to refer the cause to the master to state the account.

3. **JUDGMENTS AND DECREES**—*when direction by decree as to payment of money is not ground for reversal.* That a decree for specific performance orders the defendant to pay the amount found due from him, together with the costs, to one of complainants' solicitors, who in turn is directed to pay the costs to the proper officers, pay the solicitors' fees and turn the balance over to complainants, is not ground for reversal at the instance of the defendant.

WRIT OF ERROR to the Superior Court of Cook county;  
the Hon. H. V. FREEMAN, Judge, presiding.

BEAUREGARD F. MOSELY, (SAMUEL B. KING, of counsel,) for plaintiff in error.

JOHN J. ARNEY, and LEONARD FISKE, (VINCENT G. GALLAGHER, of counsel,) for defendants in error.

Mr. JUSTICE CARTER delivered the opinion of the court:

Plaintiff in error, Cusack, sued out this writ to reverse a decree for the specific performance of a contract to convey real estate.

There is no certificate of evidence in the record, but Cusack insists that the record shows error, and is on its face insufficient to support the decree. Six grounds of error are alleged: (1) Uncertainty in the contract, in

187	892
190	*547



that it failed to specify either the numbers or amounts of the mortgages which Cusack was to assume, and to identify the Waukesha property by any description so it might be located without extrinsic evidence; (2) that it was error for the court to take the account without a reference to the master; (3) that defendant in error Ida Budasz was not a party to the contract, and that it was error to grant her relief upon it; (4) that it was error to direct Cusack to convey by deed of warranty when it was not so provided by the contract; (5) that it was error to decree that Cusack pay the costs and the balance found due to the complainants, to Leonard Fiske, one of the complainants' counsel, who was not a party to the suit.

The only written evidence of the contract set out was the following offer of Cusack, which the complainants accepted, viz.:

"*W. Budasz, Esq., City:*

"CHICAGO, ILL., 12/8/1896.

"DEAR SIR—I will assume mortgages, give you house and lot in Waukesha and \$500 (five hundred dollars) cash for your property at 7031 and 7033 S. Sangamon st., city. This is the best I can do. If you are satisfied with this offer, call and let me know.

"Yours truly,

D. H. CUSACK."

But from the allegations of the bill, the admissions of the answer and the findings of the decree it appears that the terms of the contract were specifically agreed upon. There were two mortgages on complainants' property, and they were sufficiently described in the bill as the mortgages which Cusack agreed to assume, and inasmuch as the court heard the evidence, and the decree finds that the allegations of the bill, the amendment and the amended bill are true, the alleged uncertainty is removed. It must be presumed that the court heard competent and sufficient proof upon which to base the finding. The same is true as to the description and identity of the property in Waukesha. Inasmuch as the complainants performed the contract on their part and conveyed their property mentioned in the contract to Cusack, and Cusack

went into possession of it, improved and retained it, no reason is perceived why the contract should not be specifically enforced against him, even if it rested only in parol. Plaintiff in error did not set up the Statute of Frauds and does not rely upon it here. *Fowler v. Redican*, 52 Ill. 405.

Nor do we consider that such an accounting was required as to make it erroneous, under the decisions of this court, for the chancellor to hear the witnesses himself instead of referring the cause to the master. The ascertainment of the balance due from Cusack to the complainants upon the contract for exchange of properties was an exceedingly simple matter after the evidence was heard as to the terms of the contract. No reference was necessary. *City of Belleville v. Citizens' Horse Railway Co.* 152 Ill. 171.

Nor was it error to award relief to the complainant Ida Budasz, as contended. While she was not named in the written offer of Cusack, the bill alleged that she owned the property therein mentioned and that she joined in the contract of exchange sought to be enforced. The answer admitted that she was a party to the contract, as alleged.

As to point 4 made by plaintiff in error, we cannot say, in the absence of the evidence from the record, that it was error to decree that Cusack convey to complainants the Waukesha property by deed of warranty. The pleadings show that he required and received from the complainants such a deed for their property exchanged for the Waukesha property, and we cannot say that the chancellor was not warranted in finding that the complainants were entitled to a like conveyance of the property to be conveyed to them.

Nor should the decree be reversed at the instance of Cusack because it ordered the amount found due the complainants from Cusack, and the clerk's and sheriff's fees, to be paid to Fiske, complainants' solicitor in the cause,

and that Fiske first pay such costs to the proper officers, and next the solicitors' fees, and the balance to the complainants. We are unable to see how Cusack was injured by such an order.

Finding no error in the record the decree will be affirmed.

*Decree affirmed.*

187	395
209	112

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THE HARTFORD FIRE INSURANCE COMPANY

v.

ANDREW PETERSON, for use, etc.

*Opinion filed October 19, 1900.*

This case is controlled by the decision in *Osgood v. Skinner*, 186 Ill. 491.

*Peterson v. Hartford Fire Ins. Co.* 87 Ill. App. 567, reversed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. ELBRIDGE HANEY, Judge, presiding.

BATES & HARDING, for appellant.

D. F. FLANNERY, for appellee.

Per CURIAM: The question involved in this appeal is the same as the question involved in the case of *Osgood v. Skinner*, 186 Ill. 491. The decision in that case governs and controls this case. The order, therefore, of the Appellate Court to the circuit court of Cook county to enter a judgment for damages and interest is reversed and the cause is remanded to the Appellate Court, with directions to modify its judgment by striking out said order.

*Reversed and remanded.*

M. BYRON RICH *et al.*

v.

THE CITY OF CHICAGO.

*Opinion filed October 19, 1900.*

187	896
188	889

187	896
189	884

187	896
194a	808

187	896
192	1491
192	1492

187	896
102a	8248

187	896
103a	8210

187	896
202	266

187	896
205	860

1. RES JUDICATA—*unreversed confirmation judgment is a bar to a subsequent one for similar improvement.* A judgment confirming a special assessment for an improvement is, while it remains in full force, a bar to another judgment sought to be recovered, confirming another assessment for a similar improvement of the same street.

2. SPECIAL ASSESSMENTS—*erroneous confirmation judgment not void is not open to collateral attack.* The failure of an ordinance to describe the flat stones upon which curbing is to be set renders a confirmation judgment based thereon erroneous, but not void or subject to collateral attack.

3. SAME—*facts acquired by jury's view of premises are not evidence.* The jury, in a proceeding to confirm a special assessment, may consider the facts acquired from a view of the premises, taken by permission of the court, to better enable them to understand and apply the evidence; but such view, or the facts ascertained from it, are not evidence for their consideration.

MAGRUDER, J., dissenting.

APPEAL from the County Court of Cook county; the Hon. WILLIAM T. HODSON, Judge, presiding.

RICH & LOEHR, and GEORGE A. MASON, for appellants.

CHARLES S. THORNTON, Corporation Counsel, ARMAND F. TEEFY, and EDWARD J. HILL, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

Rich and others, owners, respectively, of certain lots in Chicago, have appealed from a judgment of confirmation of a special assessment, made under the act of 1897, to defray the cost of curbing, filling and paving with asphalt certain streets of that city.

As to eight certain lots fronting on Monroe street, (formerly Brooks avenue,) Rich, the owner, gave in evi-

dence, under his objections filed, a certain judgment of said county court rendered in 1895, confirming a special assessment made to curb, fill and macadamize said Brooks avenue, and moved the court to dismiss the petition as to said lots. Thereupon appellee's counsel moved the court to set aside said last named judgment, but whether or not the court acted upon the motion to set aside the judgment the record does not show. That is immaterial, however, as the court had no power in 1898 to set aside the judgment rendered at a prior term in 1895. As the judgment had never been reversed and was in full force it was a bar to another judgment sought to be recovered confirming another assessment for a similar improvement of the same street. *McChesney v. City of Chicago*, 161 Ill. 110; *People v. McWethy*, 165 id. 222.

Appellee contends that the prior judgment was void for the reason that the ordinance in that case did not sufficiently describe the flat stones upon which the curbing was to be set. In *Lusk v. City of Chicago*, 176 Ill. 207, we held that it was error to confirm an assessment based upon an ordinance having this defect, and it was there said that the ordinance was invalid, and the judgment of confirmation was reversed and the cause was remanded. If it had been considered that the judgment was void there would have been no necessity for remanding the cause. That was a direct proceeding, while here it is a collateral attack. If the former judgment was merely erroneous and not void, it cannot be attacked in this proceeding. In *People ex rel. v. Lingle*, 165 Ill. 65, we held that a similar insufficiency in the ordinance did not affect the jurisdiction of the court, and that the judgment of confirmation could not be attacked on an application for judgment for a delinquent special assessment. We can not, therefore, regard the former judgment as void, but only as erroneous. The objections, therefore, as to said eight lots should have been sustained.

We are also disposed to agree with appellants that the court erred in giving to the jury this instruction:

"The jury are instructed that their view of the premises assessed in this case, and the facts that they may have acquired from such view, so far as they pertain to the special benefits that said premises may or may not derive from the proposed improvement, is evidence for them in making up their verdict."

It was within the power of the court to permit the jury to view the premises, as in cases at common law, if the court, in the exercise of a sound discretion, considered such view necessary or proper to enable the jury better to understand and apply the evidence. But such view, or the facts ascertained by the jury upon such view, could not, of itself or themselves, be considered as evidence in arriving at the verdict. (*Vane v. City of Evanston*, 150 Ill. 616; *Osgood v. City of Chicago*, 154 id. 194.) The rule is not the same in cases of this character as in condemnation cases, where the statute provides for such view. In the *Vane case* we said "that the only purpose of permitting the jury to inspect and view the *locus in quo* is to better enable them to understand the matter in controversy between the parties, and to clear up any obscurity that may exist in the application of the evidence introduced in the case. \* \* \* They were not authorized to consider any fact bearing upon the merits of the controversy derived from such view." It is very clear that the instruction in question is in direct conflict with what was said in the *Vane case*, and that, as there further said, to allow such a practice would "introduce a great uncertainty in the trial of all common law causes where a personal view was permitted." In the case at bar, instead of limiting the effect as evidence in the case by proper instruction, the court instructed the jury to consider as evidence in making up their verdict their view of the premises and the facts they may have acquired from such view. This was error. The statute provides that the trial

of such cases shall be conducted as in other cases at law. This instruction violated the rule at law long established. Appellee's counsel cite *Maywood Co. v. Village of Maywood*, 140 Ill. 216, as a case sustaining such instruction, but we do not so regard it. The instruction in that case was given at the request of the objectors who were seeking to reverse the judgment, and they could not, of course, complain of it, or of the jury in following it in making up their verdict.

For the errors indicated the judgment is reversed and the cause remanded.

*Reversed and remanded.*

Mr. JUSTICE MAGRUDER, dissenting:

Under the rule frequently announced by this court the ordinance here involved must be held to be on its face "invalid." "Invalid" does not mean "defective" or "insufficient." Webster defines the word "invalid" in his dictionary as follows: "Having no force, effect or efficacy; void; null; as an invalid contract or agreement." This definition of "invalid" has been adopted by the American and English Encyclopædia of Law. (Vol. 11, p. 780). The same definition has been endorsed and approved by the Supreme Court of Indiana in the case of *State ex rel. MacKenzie v. Casteel*, 110 Ind. 174, where Mr. Chief Justice Elliott says: "The word employed in the first of the sections quoted is 'invalid;' and this word is defined by Webster to mean 'having no force, effect or efficacy; void; null.' If a sale is null or void, it can convey nothing at all," etc.

The fact that the cause was remanded does not indicate that the confirmation judgment was regarded as merely defective. This court has power to remand a cause to the circuit court, and direct it to undo its void judgment.

THE MERCY HOSPITAL *et al.*  
v.

THE CITY OF CHICAGO.

*Opinion filed October 19, 1900.*

1. SPECIAL ASSESSMENTS—*county court must review apportionment of cost of improvement.* Under section 47 of the Improvement act of 1897 the county court must, in special assessment cases, review the commissioners' apportionment of the cost of the improvement between the public and private owners, where its power in that regard is invoked by proper objections. (*City of Jacksonville v. Hamill*, 178 Ill. 235, explained.)

2. SAME—*provision of section 47 denying appeal construed.* The provision of section 47 of the Improvement act of 1897, that the county court's determination of the correctness of the apportionment of cost between the city and private owners shall be conclusive and not subject to review, does not prevent a review of the county court's action in refusing to inquire into such apportionment.

3. APPEALS AND ERRORS—*when validity of statute is not involved.* The validity of the provision of section 47 of the Improvement act of 1897, denying the right to a review of the county court's determination of the correctness of the apportionment of cost between the public and private owners, is not involved in a case where the county court made no such determination, but merely refused to inquire into the apportionment on the ground that it lacked power.

APPEAL from the County Court of Cook county; the Hon. ROBERT H. LOVETT, Judge, presiding.

MASON & NOYES, (FRANK S. LENERT, of counsel,) for appellants.

CHARLES M. WALKER, Corporation Counsel, ARMAND F. TEEFY, and WILLIAM M. PINDELL, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

This is an appeal from a judgment confirming a special assessment levied to pay the cost of grading, curbing and paving with asphalt Twenty-sixth street between certain designated points, and all intersecting streets and alleys, to the curb line of said Twenty-sixth street.



The ordinance was passed and the proceedings were taken under the act of 1897, concerning local improvements. (Hurd's Stat. p. 355.) After the filing of the petition the county court entered an order directing the superintendent of special assessments to make a true and impartial assessment of the cost of the improvement upon the city of Chicago and the property specially benefited. This officer made and reported to the court the assessment and assessment roll, in which he estimated and reported that there would be no public benefits from the improvement, and that the proportion of the total cost to be paid by the city for public benefits was "no dollars," and that the whole amount of such total cost (\$26,000) should be and was apportioned to the property benefited, and that he had apportioned and assessed such total amount upon the several lots, blocks, tracts and parcels of land in proportion to benefits. The appellants appeared and filed a long list of stock objections (fifty-three in number) to the assessment, all of which were overruled. The only objections set out or referred to in the abstract are: "(31) Said municipality has not been assessed its proportion of said assessment, although it will be greatly benefited by said improvement." "(35) This court has no jurisdiction to pass upon said assessment roll." From the inclusion of these objections in the abstract and the exclusion of all others, we must assume that the ones so included are the only ones insisted upon in this court and that all others are waived.

Under the appellants' said thirty-first objection their counsel moved the county court, as provided in section 47 of said statute of 1897, to inquire whether or not the assessment as made and returned was an equitable and just distribution of the cost of the improvement as between the public and the property, and offered to prove that the improvement was of great benefit to the public, and that as between the owners of the property assessed and the public the assessment was unjust and inequitable. But the court refused to hear any evidence on the

subject or to enter upon any inquiry, in any manner, into the question whether the apportionment of the assessment as between the city of Chicago and the property owners was just and equitable or not, upon the alleged ground that this court had in *City of Jacksonville v. Hamill*, 178 Ill. 235, decided that the court had no power to modify or change in this respect the assessment as made and returned by the proper officer. In so deciding the court fell into error. The proceeding under review in that case was a proceeding for special taxation, and not for a special assessment. We have pointed out in numerous cases that the legislature has not abolished all distinctions between special assessments and special taxation. (*Pfeiffer v. People* 170 Ill. 347; *Hull v. People*, id. 246; *Birket v. City of Peoria*, 185 id. 369.) And in the *Birket* case it was held that the provisions of the act of 1897 for the review by the trial court of the apportionment of the cost of the improvement between the municipality and the property owners do not apply to cases of special taxation, but only to special assessments. It is wholly unnecessary to repeat here the reasons for those decisions. A reference to those cited, and others, will show the error of counsel in ignoring the distinctions between the two proceedings.

We are earnestly requested by counsel to reconsider the *Hamill* case and what was there said on the question, on the ground that the attention of the court was not called to section 47 of the act of 1897, but the case was decided, it is said, without reference to that section. But, as before shown, the proceeding there was by special taxation, and the provision for the inquiry by the court whether the apportionment was just and equitable between the public and the property owners did not apply to the case then under consideration and it was not necessary to refer to that section. (*Birket v. City of Peoria*, *supra*.) The case at bar is a special assessment proceeding and the provisions of the act of 1897 do apply, and

it was error in the court below to refuse to make the inquiry provided for by the statute.

As said in the cases cited, and others, prior to this statute the court had no power to review the action of the commissioners making such apportionment, whether the proceeding was by special taxation or special assessment. The legislature must be presumed to have known the construction which this court had placed on prior statutes, and to have intended by the act of 1897 to provide a remedy for unjust and inequitable apportionments of assessments, so that the municipality, or its superintendent of assessments, could not say, arbitrarily and without regard to justice in the particular case, that the property owners whose property may be specially benefited shall pay all the cost of the improvement, when it would be made clear, upon impartial inquiry, that the public would also be benefited by the improvement and that the municipality ought to bear its just proportion of the cost. Sections 38 and 39 make it the duty of the court to direct, and of the officer to make, a just and equitable apportionment, and section 47 is as follows: "Upon objection or motion for that purpose, the court in which said proceeding is pending may, in a summary way, inquire whether the officer making the report has omitted any property benefited; also whether or not the assessment, as made and returned, is an equitable and just distribution of the cost of said improvement, first, between the public and the property; and second, among the parcels of property assessed. The court shall have the power, on such application being made, to revise and correct the assessment levied, to change or modify the distribution of the total cost between the public and property benefited, and also to change the manner of distribution among the parcels of private property, so as to produce a just and equitable assessment, considering the nature of the property assessed, and its capacity for immediate use of the improvement when completed.

The court may either make such corrections or changes, or determine in general the manner in which the same shall be made, and refer the assessment roll to the person filing the same for revision and correction. The determination of the court as to the correctness of the distribution of the cost of the improvement between the public and the property to be assessed, shall be conclusive, and not subject to review on appeal or writ of error."

The statute is too plain to admit of doubt as to the legislative intent. The power thus given to the court cannot be exercised or not, at its discretion, when invoked in a special assessment case in the manner provided by the statute, but it must be exercised. The word "may" in this respect means "must." Nor can it be said that the municipalities may, in such cases, be burdened with the cost of improvements beyond their revenues and without their consent, for they may refuse to begin, or after beginning may discontinue the proceedings if they are disinclined or find themselves unable to pay their just and equitable proportion of the improvement. In this respect they certainly occupy a more favorable position than the lot owners do.

If any doubt could arise from the statute itself whether the General Assembly intended to give the property owner the right to institute this summary inquiry in the court, it would disappear upon a consideration of prior, contemporaneous and subsequent legislation. It would seem from such legislation that the General Assembly considered that the great power which had been conferred on municipalities over one kind of property, enabling them to appropriate a large part of its value to the construction of municipal improvements often of much greater public than of local benefit, had been, or was capable of being, greatly abused, for by the amendatory act of 1895 (Laws of 1895, p. 100,) it was provided that no special tax shall be levied in excess of the special benefits accruing from the improvement to the property

specially taxed, and that the ordinance shall not be conclusive upon the question, but that it shall be subject to review by the county court. Again, by the act of June 14, 1899, it was provided that no city within the class specified shall adopt an ordinance for a local improvement, to be paid for either by special assessment or special taxation, unless petitioned for by the owners of one-half the property abutting upon the improvement. (Laws of 1899, p. 95.) And by the act of 1897 a public hearing before the board of local improvements, after proper notice, is provided for, where the property owner may appear for or against the proposed improvement; and, as we have also seen, he is entitled to be heard, in cases of special assessments, upon the application for the confirmation of the assessment, upon the question whether the distribution of the cost of the assessment as made by the person appointed for the purpose, is, as between the public and the owners of the property assessed, just and equitable. It is the duty of the courts to enforce these provisions, and the court below was as much bound to inquire (though in a summary way) into the apportionment between the city and the property owners as into any other question properly raised in the case; and the fact that no appeal from the decision as to the justice and fairness of such apportionment is by the terms of the statute allowed, only increases, if it affects at all, the responsibility of the trial court.

This brings us to the contention of appellee that this court cannot review this question, because by the express terms of section 47 the decision of the county court as to the correctness of the apportionment is conclusive and not subject to review on appeal or writ of error; and also to the contention of appellants (made in their reply briefs only and not mentioned by appellee) that that part of section 47 contravenes section 8 of article 6 of the constitution, and is therefore void. Said section 8 is: "Appeals and writs of error may be taken to the

Supreme Court, held in the grand division in which the case is decided, or, by consent of the parties, to any other grand division."

Counsel cite *Schlattweiler v. St. Clair County*, 63 Ill. 449, *Haines v. People*, 97 id. 161, and other cases, as holding that the right of appeal in such cases is guaranteed by the constitution. It is apparent from the reading of the statute that the denial of the right of review, on appeal or writ of error, is confined to the determination of the court as to the correctness of the distribution of the cost of the improvement between the public and the property to be assessed, and does not refer to the determination of the court that it will not make, or has not the power to make, the inquiry asked for by the objector. The court below did not determine whether the apportionment as made between the city and the property assessed was just and equitable or not, but only that it had no power to inquire into or to determine that question, and refused, for that reason, to enter upon the inquiry at all, consequently the correctness or justness of the distribution of the cost of the improvement as made between the public on the one hand and the property owners on the other is not involved in the appeal and was not attempted to be brought before us. That being so, the validity of the provision in question of the statute, denying the right of review, on appeal or writ of error, of that question, is outside of and not involved in this appeal. We shall not consider it. Proper exceptions were saved, however, to the decision of the court in refusing to make summary inquiry, or any inquiry, into the distribution of the cost of the improvement between the public and the property assessed, and, the appeal having been taken from the judgment of confirmation, this error is properly assigned here. It was not necessary, as contended by appellee, that appellants should, under section 48 of the statute, have waived further controversy. The appeal was not taken from an order which

that section provides shall not be final unless further controversy be waived as to remaining questions, but from the final judgment of confirmation made erroneous by errors committed upon the trial.

The judgment as to the property of the appellants is reversed and the cause remanded for further proceedings not inconsistent with the views above stated.

*Reversed and remanded.*

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NELS JOHNSON *et al.*

v.

THE CITY OF CHICAGO.\*

*Opinion filed October 19, 1900.*

This case is controlled by the decision in *Kuester v. City of Chicago*, (*ante*, p. 21.)

WRIT OF ERROR to the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

IVES, MASON & WYMAN, for plaintiffs in error.

CHARLES M. WALKER, Corporation Counsel, ARMAND F. TEEFY, and DENIS E. SULLIVAN, for defendant in error.

Per CURIAM: Upon the authority of *Kuester v. City of Chicago*, (*ante*, p. 21,) the judgment in the above entitled case and those in the three cases decided with it will be reversed and the causes will be remanded to the county court of Cook county for further proceedings in conformity with the views expressed in the above entitled cause.

*Reversed and remanded.*

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\*With this case are decided No. 930, *Sweet v. City of Chicago*; No. 895, *Libby v. Same*; and No. 947, *Baker v. Same*.

ABNER G. MURRAY *et al.*

v.

GEORGE F. EMERY, Exr. *et al.**Opinion filed October 19, 1900.*

1. MORTGAGES—*mortgage is not barred if debt is alive.* A mortgage is but an incident of the debt, and is barred only when the debt is barred; nor has the law in this respect been changed by the Limitation act of 1872.

2. SAME—*when the Statute of Limitations cannot be interposed in foreclosure.* If the debt secured by a recorded trust deed has been kept alive by a purchaser of the property who assumed, and for a sufficient consideration agreed to pay, the debt, a grantee of such purchaser takes subject to the deed of trust, and cannot plead the limitation to defeat foreclosure while the debt remains alive.

*Murray v. Emery*, 85 Ill. App. 348, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOHN BARTON PAYNE, Judge, presiding.

EDWIN B. HARTS, for appellants.

CHARLES L. CAPEN, and CHARLES E. POPE, for appellees.

Mr. JUSTICE CARTER delivered the opinion of the court:

The appellant Murray filed his bill of complaint in the superior court of Cook county to remove as a cloud upon his title to certain real estate a certain deed of trust. The appellees, who were made defendants, appeared and answered, and then filed their cross-bill to foreclose said deed of trust. The appellant Harts also filed his cross-bill for an accounting. The court, on the hearing, dismissed Murray's bill and Hart's cross-bill, and entered a decree of foreclosure as prayed by Emery and others in their cross-bill. On appeal the Appellate Court affirmed



the decree, and Murray and Harts have appealed to this court.

The meritorious facts are, that in 1874 Elvira W. Spaulding acquired title to the land, and on March 13, 1874, executed the deed of trust in controversy conveying the land to appellee Sweet, as trustee, to secure the three notes, of \$2666.66 each, given by one Poucher for a part of the purchase money. Why Poucher instead of Spaulding, who took the title, made these notes does not appear, nor, as we view the case, is it material. Afterward, in 1874, Spaulding conveyed a part of the land, by warranty deed, to Butler, and later, in 1875, conveyed by similar deed the rest to Butler. By these deeds Butler assumed the encumbrance created by the deed of trust. Afterward, in 1875, Butler, by his deed of warranty, conveyed the land to appellant Harts subject to the encumbrance, which, by the effect of the terms of the deed, Harts assumed. The three notes, aggregating \$8000, were in due course, soon after they were made, assigned to Hanson M. Hart, of Portland, Maine. Harts paid the interest on the notes to Hanson M. Hart for nearly twenty years, and in January, 1895, gave to him a writing duly signed by him, Harts, reciting that he, Harts, was the owner of the land subject to the encumbrance and was bound to pay the notes and interest, and that the holder, Hanson M. Hart, had forborne, at his request, to enforce payment, and that it was not then convenient for him to pay. Harts then, by this agreement, agreed that in consideration of the forbearance of Hanson M. Hart he would not avail himself of the Statute of Limitations to any suit to enforce collection by foreclosure or otherwise, and that in case he should sell the land the notes should be fully paid, and that Hanson M. Hart should lose nothing by his forbearance; that the agreement should be binding on him, the maker of it, his heirs and assigns, and should inure to the benefit of Hanson M. Hart, his heirs, executors and assigns. Hanson M. Hart died afterward, and

appellee Emery became his executor, and soon thereafter Harts conveyed the land, by deed of warranty, to appellant Murray, for the purported consideration of \$10,000. Murray, then claiming to be the owner and without knowledge of the encumbrance, brought his bill, as before stated, to remove the deed of trust as a cloud upon his title.

The questions involved were properly decided by the Appellate Court and the reasons sufficiently stated in the opinion of that court. (*Murray v. Emery*, 85 Ill. App. 348.) The only one requiring notice here is, whether the land, the title to which had vested in Murray, was still subject to the encumbrance, or whether the defense of the Statute of Limitations set up by Murray as a bar to the foreclosure was maintained.

We have often held that the mortgage is an incident of the debt and is barred only when the debt is barred, and that the act of 1872 in regard to limitations has not changed the law in this respect. (*Schifferstein v. Allison*, 123 Ill. 662; *Richey v. Sinclair*, 167 id. 184.) The indebtedness secured by the deed of trust had been kept alive by Harts, who, though not the original debtor, had assumed and agreed, upon a sufficient consideration, to pay it, and while he owned the property the statute would have been no defense to foreclosure. It was no more available to the grantee of Harts than to Harts himself. When he took title from Harts he took it with notice from the public records that it was subject to this mortgage, which was not barred unless the debt it secured was barred. As to the foreclosure, he stood in no better position than Harts occupied. (*Richey v. Sinclair*, *supra*.) Harts had no defense to Emery's cross-bill, neither had Murray.

The judgment of the Appellate Court affirming the decree of the superior court is affirmed.

*Judgment affirmed.*

D. W. GRAHAM  
v.  
THE CITY OF CHICAGO.

*Opinion filed October 19, 1900.*

187	41
188	54

1. SPECIAL ASSESSMENTS—*right of city to provide for whole cost of improvement by special assessment.* A city has power to provide for the whole cost of a local improvement by special assessment, even though it is not shown that steps were taken prior to the passage of the ordinance to ascertain whether there was property benefited to that extent, since the distribution of public and private cost is reviewable by the court upon application for confirmation.

2. SAME—*court's action on distribution of cost of improvement is not reviewable.* Under section 47 of the Improvement act of 1897 the action of the county court in the matter of the distribution of the public and private cost of a local improvement being constructed by special assessment is not open to review upon appeal or error.

3. SAME—*that city requires guaranty for maintenance and repair of pavement does not vitiate assessment.* That the city, in its contracts for vitrified brick pavements, requires the contractor to give a written guaranty for maintenance and repair, does not vitiate a special assessment for the improvement on account of increased contract price occasioned by such guaranty.

WRIT of ERROR to the County Court of Cook county;  
the Hon. O. H. GILMORE, Judge, presiding.

FRANK S. SHAW, (GEORGE R. BROWN, of counsel,) for  
plaintiff in error.

CHARLES M. WALKER, Corporation Counsel, DENIS E.  
SULLIVAN, and WILLIAM M. PINDELL, for defendant in  
error.

Mr. JUSTICE HAND delivered the opinion of the court:

This is a writ of error sued out of this court to the county court of Cook county to review a judgment confirming a special assessment against the land of plaintiff in error to pay for curbing, grading and paving with vitrified brick South Wood street, in the city of Chicago,

from the south line of Washington boulevard to the north line of the City railway right of way on Twelfth street boulevard.

Upon recommendation of the board of local improvements of the city of Chicago the city council passed an ordinance for the proposed improvement, which ordinance, after giving the nature, character, location and description of the improvement, provided for the raising of the amount necessary to pay the cost thereof by special assessment. The usual petition was filed by the city in the county court, praying that a special assessment be levied and confirmed to pay for the proposed improvement, in accordance with the terms of the ordinance. On the trial of legal objections, testimony was given showing that South Wood street, along the line of the proposed improvement, contained many buildings of a public nature, and that the benefit to the public from the proposed improvement would be greater than from the improvement of the average street, and would equal from one-fifth to one-third of the cost of the improvement; also, that the city of Chicago, in its contracts for vitrified brick improvements, such as was contemplated in this improvement, required the contractors to give a written guaranty for the maintenance and repair of the street improved. The court overruled all legal objections based on the foregoing facts and the case was submitted to a jury, which reduced the assessment against the property of plaintiff in error to \$562.50, and upon this verdict judgment was entered by the court.

It is first objected that the ordinance in this case is void, for the reason that it provides the whole cost of the proposed improvement shall be paid for by special assessment, while it is not shown that any steps were taken prior to the passage of the ordinance to ascertain whether there was property in existence which will be benefited to the amount of the cost of the proposed improvement. Section 1 of the act of June 14, 1897, (Hurd's

Stat. 1897, p. 355,) provides: "That the corporate authorities of cities, villages and incorporated towns are hereby vested with the power to make such local improvements as are authorized by law, by special assessment, or by special taxation, of contiguous property, or by general taxation, or otherwise, as they shall by ordinance prescribe." Section 4 of the act provides: "When any such city, village or town shall by ordinance provide for the making of any local improvement, it shall by the same ordinance prescribe whether the same shall be made by special assessment, or by special taxation of contiguous property, or general taxation, or both." Section 8 of the act provides: "Such ordinance shall prescribe the nature, character, locality and description of such improvement, and shall provide whether the same shall be made wholly or in part by special assessment, or special taxation of contiguous property; and if in part only, shall so state."

The foregoing sections clearly confer upon municipalities the power to determine, by ordinance, whether a local improvement shall be paid for wholly or in part only by special assessment. It is manifest, therefore, the ordinance was not void for want of power in the municipality to pass the same. The passage of said ordinance was, in effect, a determination by the municipality that the property to be assessed would be benefited to the amount of the cost of the proposed improvement and that there would be no public benefit arising therefrom. (*Lightner v. City of Peoria*, 150 Ill. 80, and cases cited.) Under the authority of *Birket v. City of Peoria*, 185 Ill. 369, such determination is not final, and upon application for the confirmation of such assessment the county court wherein such proceedings were pending had full power to revise and change the distribution of the cost of the improvement as fixed and determined by said ordinance between the petitioning municipality and the property to be assessed, so as to make the assessment a just and equitable one. In that case we say (p. 370): "It is ex-

pressly provided by the act of June 14, 1897, (Hurd's Stat. 1897, secs. 36, 38, 39, p. 363,) that where the ordinance contains no provisions for condemnation, and provides that the improvement shall be paid for wholly or in part by special assessment, the court shall, upon the filing of the petition, enter an order directing the superintendent of special assessments to make a true and impartial assessment of the cost of the improvement upon the petitioning municipality and the property benefited by the improvement. Section 39 provides that 'it shall be the duty of such officer to estimate what proportion of the total cost of such improvement will be of benefit to the public and what proportion thereof will be of benefit to the property to be benefited, and to apportion the same between the city \* \* \* and such property, so that each shall bear its relative, equitable proportion.' And sections 47 and 48 confer power on the court to determine whether or not the assessment as made and returned is an equitable and just distribution of the cost of the improvement between the public and the property, and to change or modify such distribution. \* \* \* Under prior legislation we have uniformly held that the court had no power to change the distribution made by or under the provisions of the ordinance of the cost of the improvement between the public and the property assessed. (*Bigelow v. City of Chicago*, 90 Ill. 49; *Fagan v. City of Chicago*, 84 id. 227; *Watson v. City of Chicago*, 115 id. 78; 3 N. E. Rep. 430; *City of Sterling v. Galt*, 117 Ill. 11; 7 N. E. Rep. 471; *Billings v. City of Chicago*, 167 Ill. 337; 47 N. E. Rep. 731; *Walters v. Town of Lake*, 129 Ill. 23; 21 N. E. Rep. 556.) This rule was applied in both special assessment and special taxation proceedings, and it is clear that it was the intention of the legislature to change the rule as applied to special assessments, so that the court in which the proceedings shall be pending for confirmation of the assessment shall have power to revise and change the distribution of the cost of the improvement between the

petitioning municipality and the property to be assessed, so as to make the assessment a just and equitable one."

It is next objected that the trial court erred in refusing to re-distribute the cost of the proposed improvement between the public and the property owners. It clearly appears from the record that the court below did hear evidence upon and consider such question and refused to change such distribution. We cannot review the decision of the court on that question. The statute expressly provides "the determination of the court as to the correctness of the distribution of the cost of the improvement between the public and the property to be assessed, shall be conclusive, and not subject to review on appeal or writ of error." (Act 1897, sec. 47.) In the case of *Bickerdike v. City of Chicago*, 185 Ill. 280, in considering an objection to the constitutionality of this statute, we said (p. 287): "It is next claimed that the distribution of cost between the public and the property assessed was not just or equitable, and that section 47 of the act of 1897, concerning local improvements, providing that the determination of the court on that question shall be conclusive and not subject to review on appeal or writ of error, is unconstitutional and void. The estimate was that there would be no public benefit from the sewer, and the entire cost was levied on private property. We have held under former laws that the decision on that question was conclusive. The proceeding is not a case within the meaning of the constitution, and the right to appeal from the conclusion of the county court is within the control of the legislature. The act is not in violation of the constitution." See, also, *Birket v. City of Peoria*, *supra*.

It is next claimed that the city, in its contracts for vitrified brick improvements, such as is contemplated in this case, requires the contractor to give a written guaranty for the maintenance and repair of such improvement, and that the contract price of such improvement is increased by reason thereof. We are of the opinion

such guaranty does not vitiate the assessment. *Cole v. People*, 161 Ill. 16.

We find no substantial error in this record. The judgment of the county court is therefore affirmed.

*Judgment affirmed.*

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GEORGE A. FEHRINGER, *et al.*

*v.*

THE CITY OF CHICAGO.

*Opinion filed October 19, 1900.*

SPECIAL ASSESSMENTS—*ordinance must specify height and location of curb.* An ordinance which fails to prescribe the height of a combined curb and gutter or state where the curb is to be placed is insufficient to sustain a special assessment for such curb and gutter. (*Jacobs v. City of Chicago*, 178 Ill. 560, followed.)

WRIT OF ERROR to the County Court of Cook county;  
the Hon. C. H. DONNELLY, Judge, presiding.

WILLIAM F. CARROLL, and M. F. CURE, for plaintiffs  
in error.

CHARLES M. WALKER, Corporation Counsel, ARMAND  
F. TEEFY, and WILLIAM M. PINDELL, for defendant in  
error.

Per CURIAM: Upon the authority of *Jacobs v. City of Chicago*, 178 Ill. 560, and later cases, holding that city ordinances which fail to prescribe the height of a combined curb and gutter or state where the curb is to be placed are insufficient to sustain a special assessment for such curb and gutter, the judgment in this case must be reversed and the cause remanded to the county court of Cook county.

*Reversed and remanded.*



W. E. ROLLO *et al.*  
v.  
THE CITY OF CHICAGO.

*Opinion filed October 19, 1900.*

1. SPECIAL ASSESSMENTS—*engineer's estimate of cost of lineal feet of curb presumed to be based on ordinance.* If a paving and curbing ordinance excepts street and alley intersections from the amount of curbing required, it will be presumed the engineer's estimate for a certain number of lineal feet of curbing omits the street and alley intersections, although it is not so expressly stated.

2. SAME—*effect of failure of paving ordinance and estimate to provide for filling.* If no provision for filling is contained in the ordinance or estimate, it will be presumed, on appeal, that the engineer, from an examination, had determined that no filling would be necessary.

3. The objections that the height of the curb and the grade of the street are not sufficiently established by the ordinance under consideration are determined adversely to appellants under the authority of *Mead v. City of Chicago*, 186 Ill. 54.

APPEAL from the County Court of Cook county; the Hon. R. H. LOVETT, Judge, presiding.

MASON & NOYES, (FRANK S. LENERT, of counsel,) for appellants.

CHARLES M. WALKER, Corporation Counsel, ARMAND F. TEEFY, and WILLIAM M. PINDELL, for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

This is a special assessment proceeding for the improvement of Honore street, in the city of Chicago, from the south line of West Madison street to the south curb line of West Adams street, by curbing, grading and paving the roadway of the street between said points with asphalt. Appellants' property was assessed. They appeared and filed objections, which were overruled, the assessment was confirmed and they have appealed.

The ordinance provides a granite concrete combined curb and gutter shall be constructed on each side of the roadway of Honore street between the south line of West

Madison street and the south curb line of West Adams street, except across the roadways of intersecting streets and alleys between said points. The description in the estimate in regard to combined curb and gutter is as follows: "Granite concrete combined curb and gutter, lineal feet, 2064.07, at 60c, \$1238.44." It is argued by appellants there is a variance between the ordinance and the estimate of the engineer in this: that the engineer has estimated the cost of the curb and gutter for the whole distance of the improvement, including streets and alleys, while the ordinance excludes the streets and alleys. How are we to determine the matter? No data are given from which we can ascertain the distance between the south line of West Madison street and the south curb line of West Adams street on Honore street, or the number or the width of the intersecting streets and alleys between said points. We will presume the officer making the estimate did his duty and that his estimate is correct, until the contrary is shown. We held in *Mead v. City of Chicago*, 186 Ill. 54, that the engineer's estimate of the cost of curbing, which specified a certain number of lineal feet without stating that street and alley intersections were omitted, did not tend to establish that the estimate included such intersections which were excepted by the ordinance.

It is further objected that the height of the curb, which is a part of the combined curb and gutter upon each side of the roadway, is not given, and for that reason the ordinance is void. With respect to the height of the curb the ordinance provides that the upper surface of the finished roadway and the top edge of the curb shall coincide with the established grade of the street; that the height of the curb at the back shall vary from seventeen inches at the catch-basin inlets to nine inches at the summits; that the surface of the finished roadway at the summits in the gutters midway between catch-basins shall be four inches below said established grade of the

street and the surface at the catch-basin inlets in the gutters shall be twelve inches below said grade, and that the slope of the gutters adjoining the roadway face of the curb shall be uniform from the summits to the catch-basins. The slope of the gutter-flags is particularly provided for, and it is ordained that a transverse section of the finished roadway and gutter-flags shall be a true arc of a circle passing through the grade of the gutter and the center of the finished roadway. Here are given all the data necessary to determine the height of the curb. This, under the authority of *Claffin v. City of Chicago*, 178 Ill. 549, and *Mead v. City of Chicago*, *supra*, is sufficient.

It is claimed that the grade of the street as established by the ordinance is insufficient. The ordinance fixes the grade for the entire length of the improvement at certain heights above datum, and provides: "The above heights, as fixed, shall be measured from the plane of low water in Lake Michigan of A. D. 1847, as established by the trustees of the Illinois and Michigan canal, and adopted by the late board of drainage commissioners and by the late board of public works of the city of Chicago as the base or datum for city levels." Under the authority of *Chicago Terminal Railroad Co. v. City of Chicago*, 184 Ill. 154, and *Mead v. City of Chicago*, *supra*, the ordinance, in that particular, is sufficient.

It is also said that in case filling is necessary in the preparation of the sub-grade, the contractor cannot know from this ordinance what kind is required, hence he can not make an intelligent bid for the work. The ordinance does not call for any filling and none is provided for in the estimate. We will presume that the engineer, from an examination, determined that no filling was necessary, or it would have been provided for in the ordinance and estimate.

The objections made do not warrant a reversal, and the judgment of the county court is affirmed.

*Judgment affirmed.*

BESSIE SANDERS SAYLES *et al.*

v.

MINNIE CHRISTIE *et al.**Opinion filed October 19, 1900.*

187	420
187	582

187	420
194	48
194	51

187	420
200	1408
187	420
208	490

187	420
211	607

1. **ADOPTION**—*special adoption act not violative of constitution of 1848.* A special act of adoption, passed in 1867, is not, because of its giving the adopted child the right to inherit, violative of section 8 of article 13 of the constitution of 1848, providing that "no freeman shall be \* \* \* in any manner deprived of his \* \* \* property except by the judgment of his peers or the law of the land," since the right to inherit and the right to devise are dependent upon the acts of the legislature.

2. **SAME**—*adoption act presumed to have been requested by the adopting parents.* A special act of adoption will be presumed to have been passed at the request or with the consent of the adopting parents, although the act does not upon its face show such fact.

3. **RENUNCIATION**—*effect of renunciation by widow where there is an adopted child.* The widow of a testator who dies leaving an adopted child, cannot, by renouncing the provisions of the will, elect to take one-half the real and personal property in lieu of dower, under section 12 of the Dower act, permitting such course if the testator leaves no child or descendant of a child, since the adopted child is the lawful child of the testator for purposes of inheritance.

4. **INFANTS**—*a woman's minority terminates in Illinois at the age of eighteen.* In Illinois a woman reaches her legal majority at the age of eighteen years.

5. **SAME**—*right of infant or his heirs to disaffirm deed or gift.* A conveyance by an infant, in person, is voidable, only, and must be disaffirmed, if at all, within three years after attaining majority; but in case of the death of such infant in the meantime, his heirs may disaffirm the deed within the same time.

6. **SAME**—*filing bill to cancel infant's deed is an election to disaffirm.* The filing of a bill by the heirs of an infant grantor for the purpose of setting aside the infant's deed amounts to an election by such heirs to disaffirm the deed.

7. **SAME**—*presumptions are against fairness of gift from child to parent.* In case of a voluntary conveyance of valuable property from a minor daughter to her mother the presumptions are all against the fairness of the transaction, and the burden of proof is upon the parent to establish its fairness.

8. **RATIFICATION**—*declarations to strangers do not amount to ratification of infant's deed.* Declarations by the grantor in a voluntary

conveyance executed during infancy, made to strangers in the absence of the grantee in the deed, do not amount to a ratification.

9. *SAME*—*what necessary to constitute ratification of infant's act.* In order to constitute a ratification of acts done in infancy, the act relied upon as a ratification must be performed with a full knowledge of its consequences and with the express intent to ratify what is known to be voidable.

10. *SAME*—*effect where conditions at time of ratification and time of original act are the same.* If the same conditions and the same influences and want of knowledge of the facts exist at the time of an alleged ratification as existed at the time of the original act, the alleged ratification is held to be part of the original transaction and is ineffective.

11. *WITNESSES*—*when donee is incompetent under section 2 of the Evidence act.* In a suit by the heirs of an infant to set aside a voluntary conveyance made by their ancestor during infancy, the grantee in such conveyance, who claims the entire interest of the deceased person under the deed, is incompetent, under section 2 of the Evidence act, to testify as to acts of ratification by the infant.

APPEAL from the Circuit Court of DuPage county; the Hon. CHARLES A. BISHOP, Judge, presiding.

The bill in this case, as originally framed, was filed on January 3, 1899, and, as amended, on November 13, 1899, by the appellant, Bessie Sanders Sayles, against the appellant, Robert Allen Gates, and the appellees, Minnie Christie, James Boyd Christie, Mary Rebecca Christie and Mildred Jennie Christie, the last three being infants, and also against Fred Genthe and Stephen Whitcomb, the latter being tenants under Minnie Christie in possession of portions of the property involved. The object of the bill is to secure a partition of certain real estate situate in DuPage county, and also to set aside a deed alleged to have been made by one Minnie Belle Sanders Gates, deceased, to her mother, the appellee, Minnie Christie, on August 8, 1895. Robert Allen Gates filed answers to the original and amended bills, admitting the allegations thereof, and claiming dower in the property of his deceased wife, the said Minnie Belle Sanders Gates. Gates also filed on January 9, 1899, an original cross-bill, and on November 13, 1899, an amended cross-bill, also

praying for partition, and for the setting aside of the deed in question, and for assignment of dower in the interest in said premises owned by his deceased wife. Answers were filed to the original and amended bills, and to the original and amended cross-bills, by Minnie Christie, denying substantially the allegations of said bills and claiming a greater and different interest in the property sought to be divided than that mentioned in the bills. A guardian *ad litem* was appointed for the three minor defendants, and filed answers for them, neither admitting nor denying the allegations of the bills, and submitting their rights to the protection of the court. A further amendment was filed to the original and amended bills on March 28, 1900, setting up the act of the legislature hereinafter mentioned, and, on the same day, the same amendment was made to the original and amended cross-bills. Answers were duly filed to the bills as thus further amended.

On March 28, 1900, the circuit court rendered a decree, sustaining the deed made on August 8, 1895, by the deceased Minnie Belle Sanders Gates to the appellee, Minnie Christie, and refusing to set the same aside. The decree also found, that the complainant in the bill, Bessie Sanders Sayles, and the defendant therein, Minnie Christie, were the owners in fee each of an undivided half of all the premises described in the bill, and ordered that partition be made thereof accordingly. The decree dismissed the cross-bills of appellant, Gates, for want of equity, and also dismissed the original bill as to the said Gates and the minor defendants above named. The decree further ordered an accounting by Minnie Christie to the complainant for the rents of the premises from and after December 27, 1898.

The present appeal is prosecuted from the decree so entered by the circuit court.

The facts, as developed by the pleadings and the proofs, so far as it is necessary to state them, in order

to understand the questions involved, are substantially as follows:

Frederick H. Mather of DuPage county was the owner in fee of the premises in question at the time of his death, and died testate on January 16, 1895, leaving him surviving his wife, Rhoda E. Mather, and the appellee, Minnie Christie, alleged to have been his adopted daughter and only heir-at-law. Frederick H. Mather and Rhoda E. Mather had no children of their own.

The will of Frederick H. Mather bears date March 28, 1884. By a codicil dated November 8, 1890, the testator appointed new executors and re-published his will. After the death of Frederick H. Mather, and on February 4, 1895, his will and codicil were admitted to probate in the county court of DuPage county.

The appellee, Minnie Christie, whose name originally was Mary Adelaide McMahon, is claimed to have been adopted by Frederick H. Mather and his wife, and thereafter was known as Mary Adelaide Mather, or Minnie Mather. She married a man by the name of Sanders, and by him had two children, who were daughters, to-wit: Minnie Belle Sanders, born on August 8, 1878, and the appellant, Bessie Sanders Sayles, formerly Bessie Sanders, born on December 28, 1880. The oldest daughter, Minnie Belle Sanders, was married on or about August 14, 1895, to the appellant, Robert A. Gates; she became eighteen years of age on August 8, 1896, one year after her marriage, and died childless and intestate on March 17, 1898, leaving her surviving, as her only heirs-at-law, her husband, the appellant, Robert A. Gates; her mother, the appellee, Minnie Christie; her sister of the whole blood, the appellant, Bessie Sanders Sayles; and her half-brother, James Boyd Christie, and half-sisters, Mary Rebecca Christie and Mildred Jennie Christie. Sanders, the first husband of the appellee, Minnie Christie, died, and she subsequently married a man by the name of Andrew J. Christie, and by him had the three minor children,

James Boyd, Mary Rebecca and Mildred Jennie above named. The appellant, Bessie Sanders Sayles, formerly Bessie Sanders, attained the age of eighteen years on December 27, 1898, but theretofore, to-wit, on April 27, 1898, she married, and is now the wife of, Frederick L. Sayles.

By his will Frederick H. Mather gave the remainder of his personal property, after the payment of his debts, to his wife, Rhoda E. Mather, if she should survive him, and gave her the possession, control, use, rents, issues and profits of all his real estate during her natural life, if she should survive him. She did survive him, and, under the will, became entitled to the use of the real estate here involved during her natural life. By the terms of the will the testator devised, after the death of his wife, Rhoda E. Mather, the possession, control, use, rents and profits of his real estate to the said appellee, Minnie Christie, until Bessie Sanders, now Bessie Sanders Sayles, one of the appellants, should arrive at the age of eighteen years, provided that Minnie Christie should first deduct and pay therefrom all taxes, proper and necessary repairs, insurance, and a sufficient sum to properly and liberally support, maintain and educate her two daughters, Minnie Belle Sanders and Bessie Elizabeth Sanders. The will also provided, that Minnie Christie, in case she should live longer than the time when the said Bessie should become eighteen years of age, should not have the possession, rents, etc., of said premises after Bessie arrived at that age. The seventh paragraph of the will provided that, after Bessie arrived at the age of eighteen years, she and her sister, Minnie Belle Sanders, should have and own all of said real estate, and the testator thereby devised the same to them and their heirs forever. In the third paragraph of his will Frederick H. Mather provides that "if I survive my said wife, then I give and bequeath my personal property to my adopted daughter, Minnie Christie, and her children, Minnie Belle Sanders



and Bessie Elizabeth Sanders, in three equal shares, to have and hold the same to them and their heirs forever."

By a written instrument, dated February 28, 1884, Rhoda E. Mather, under her hand and seal, accepted the provisions of her husband's will in the following words, to-wit: "In consideration of the provisions of the foregoing will in my favor and the high regard I have for my husband, and my confidence in his judgment, I do hereby express entire satisfaction with such will and agree to accept and abide by all the provisions thereof, and do hereby waive any and all claim in any part of said property as heir or otherwise except as provided by said will."

On March 9, 1895, Rhoda E. Mather, then widow of Frederick H. Mather, signed a written renunciation in the following words, to-wit: "I, Rhoda E. Mather, surviving wife of Frederick H. Mather, late of the county of DuPage and State of Illinois, deceased, do hereby renounce and quit-claim to any benefit or provision made in the will of my said husband in lieu of dower and any devise, benefit or advantage given or made to me by the last will and testament of the said Frederick H. Mather, and I do hereby elect to take in lieu thereof my dower and legal share in the real and personal estate of the said Frederick H. Mather, and such statutory rights provided by law as I may be entitled to by virtue of renouncing the provision of the said will made for me and in my behalf." This renunciation was filed in the county court of DuPage county and recorded therein in the probate record thereof on March 11, 1895.

On March 9, 1895, Rhoda E. Mather executed her will, dated on that day, and, by the terms thereof, directed that all debts be paid, and then gives, bequeaths and devises "unto my adopted daughter, Minnie Christie," all the residue, etc., of my estate both real and personal; and appoints Andrew J. Christie sole executor. The witnesses to this will were Luther H. Hiatt, H. W. Vanderhoof and C. H. Wayne. On August 8, 1895, Rhoda E.

Mather re-published and re-affirmed the foregoing will, and the re-publication thereof was witnessed by R. N. Botsford, John H. Kampp and John C. Neltnor. On the same day, on which the will of Rhoda E. Mather was thus re-published, to-wit, August 8, 1895, the deceased, Minnie Belle Sanders, then just seventeen years of age, and six days before her marriage to appellant, Robert A. Gates, executed to her mother, the appellee, Minnie Christie, the deed which the bill in this case seeks to set aside. By that deed, which was acknowledged on the day of its date, to-wit: August 8, 1895, before John C. Neltnor, styling himself a police magistrate in and for DuPage county, and the same Neltnor, who is a witness to the re-publication of Mrs. Mather's will, Minnie Belle Sanders of Wheaton, DuPage county, for the expressed consideration of \$1000.00, and other good and valuable considerations, conveys and quit-claims to Minnie Christie of the same place "all interest in the following described real and personal estate, to-wit: being all my rights, title and interest in and to the real estate of which the late said Fred H. Mather died seized and possessed of, and all other claim, right and interest which I now may have in and to the estate, property and effects of the said Fred H. Mather, late of said DuPage county, either of real or personal estate, or by or under the provisions of the last will and testament of the said Fred H. Mather, situated in the county of DuPage, \* \* \* hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of this State." This deed was executed and acknowledged by Minnie Belle Sanders in the presence of her mother and in a house located upon a part of the premises therein conveyed. Her mother then lived upon said premises, and was in possession thereof, and was drawing the rents and profits of the same.

Rhoda E. Mather died on or about December 16, 1895, leaving the will aforesaid. Her will, and the re-publica-

tion thereof, were duly filed and admitted to probate in said county court. When she made said will, and at the time of her death, Mrs. Mather was living with Minnie Christie in the house upon the said premises already referred to.

On September 12, 1856, an indenture of service was entered into between John D. Ackerman, overseer of the poor, and Frederick H. Mather, signed by both of them, wherein it is witnessed that Mary Adelaide McMahan is a minor child chargeable to the town, and that, therefore, said overseer hereby binds said Mary Adelaide McMahan of the age of one year September 28, 1856, to Frederick H. Mather, as a servant, to live with said Frederick H. Mather from the date of said indenture until she should attain the age of eighteen years, agreeing that she will faithfully serve said Mather during said term, obey all his reasonable commands, and not harm or damage the goods, property or interests of said Mather, nor absent herself from his service, but behave as a good and faithful servant; and thereby said Mather agrees to teach and instruct her in the arts of house-keeping and teach her to read and write, and to pay her \$100.00 at the expiration of said term of service.

By an act of the legislature, approved on March 9, 1867, entitled "An act to change the name of Minnie McMahan to Minnie Mather, and make her heir-at-law of Frederick H. Mather and Rhoda E. Mather," it is enacted in section 1 by the People of the State represented in the General Assembly, "that the name of Minnie McMahan be and the same is hereby changed to that of Minnie Mather;" and, by section 2, it is enacted, "that the said Minnie Mather shall be and she is hereby declared to be entitled to all the rights that would belong or pertain to her were she the daughter of said Frederick H. Mather and Rhoda E. Mather, and the said Minnie Mather shall for all purposes whatsoever be the heir-at-law of said Frederick H. Mather and Rhoda E. Mather,

with full power to take, hold, enjoy and transmit any and all property that shall or may descend to her from them or either of them in the same manner as if she had been a natural born child of said Frederick H. Mather and Rhoda E. Mather;" and, by section 3, it is enacted: "This act shall be in force from and after its passage."

HECKMAN, ELSDON & SHAW, for appellants:

An agreement on the part of a wife to accept and abide by the provisions of her husband's will is binding upon her, and cannot be rescinded by her or her heirs or devisees after the husband's death, especially where the husband has died relying upon such agreement. *Dicken v. McKinley*, 163 Ill. 318; *Carmichael v. Carmichael*, 72 Mich. 76; *Whiton v. Whiton*, 179 Ill. 32; *Weingaertner v. Pabst*, 115 id. 412; *Blatchford v. Newberry*, 99 id. 62; *Lambert on Dower*, 552, 68; *Divala v. Divala*, 2 Derm. 274; *McCarter v. Peller*, 2 Paige's Ch. 511; *Blake v. Blake*, 7 Iowa, 46; *Robertson v. Robertson*, 25 id. 350; *McKey v. Reynolds*, 26 id. 578; *Huston v. Seeley*, 27 id. 183; 8 Wend. 267; 2 Scribner on Dower, (2d ed.) p. 253, note 2.

A deed made by an infant is voidable, and he may disaffirm the same within three years after attaining his majority. *Keil v. Healey*, 84 Ill. 104; *Blankenship v. Stout*, 25 id. 132; *Cole v. Pennoyer*, 14 id. 158; *Harrer v. Wallner*, 80 id. 197.

This right to disaffirm is not confined to the infant alone, but his heirs may also disaffirm within the same time that the infant himself might have done if living. *Illinois Land Co. v. Bonner*, 75 Ill. 315; *Tyler on Infancy*, secs. 19, 30; 3 Bacon's Abr. title "Infancy and Age," 138; *Miskey's Appeal*, 107 Pa. St. 612; *Allore v. Jewell*, 94 U. S. 511; *Jones v. Thompson*, 5 Del. Ch. 374; *Roche v. O'Brien*, 1 Ball & B. 330.

Where the relation of parent and child exists, the court will presume fraud and undue influence when the child improvidently deeds all or most of its property to

the parent; and the burden of proof is cast upon the parent to prove that the transaction was a reasonable, and, as it is often called, a "righteous one." *White v. Ross*, 160 Ill. 56; *Hoghton v. Hoghton*, 15 Beav. 278; *Miskey's Appeal*, 107 Pa. St. 611; *Ashton v. Thompson*, 32 Minn. 25; *Brooks v. Berry*, 2 Gill, 83; *Jones v. Thompson*, 5 Del. Ch. 374; *Jones v. Lloyd*, 117 Ill. 597; *Roby v. Colehour*, 135 id. 300; 27 Am. & Eng. Ency. of Law, pp. 485, 486, and cases in note 1; *Gibson v. Jeyes*, 6 Ves. 266; *Davis v. Strange*, 86 Va. 808; *Ward v. Armstrong*, 84 Ill. 151; Bigelow on Fraud, 356; *Wright v. VerPlank*, 8 DeG., M. & G. 137; *Whitridge v. Whitridge*, 76 Md. 54.

To constitute a valid ratification of a voidable deed, the act amounting to such ratification must be done with all the deliberation that ought to attend a transaction the effect of which is to ratify that which in justice ought never to have taken place. And where the same conditions exist as did originally, and the same influences and lack of knowledge of the facts, the ratification is held to be a part of the original transaction and to be ineffectual as a ratification. *Morse v. Royal*, 12 Ves. 355; *Adams v. Brimmer*, 74 N. Y. 539; Bump's Kerr on Fraud and Mistake, 296; *Roche v. O'Brien*, 1 Ball & B. 330; *Roby v. Colehour*, 135 Ill. 300; *Railroad Co. v. Kelley*, 77 id. 426; *Greenfield's Estate*, 14 Pa. St. 507; *Dunbar v. Tredumick*, 2 Ball & B. 304; *Kempson v. Ashbee*, L. R. 10 Ch. 15; *Wood v. Downes*, 18 Ves. 122; *Cocking v. Pratt*, 1 Ves. Sr. 401; *Glum v. Garth*, 133 N. Y. 18; *Mitchell v. Homfray*, 8 Q. B. Div. 587.

Where persons are suing or defending as the heirs of a deceased person and against one who claims the entire interest of such deceased person under a deed, the one so claiming is incompetent as a witness in her own behalf under section 2 of the statute. *Way v. Harriman*, 126 Ill. 132; *Shaw v. Schoonover*, 130 id. 448; *Shovers v. Warrick*, 152 id. 355; *Bevelot v. Lestrade*, 153 id. 625; *Stodder v. Hoffman*, 158 id. 486; *Wilson v. Wilson*, 158 id. 568; *Leavitt v. Leavitt*, 179 id. 87.

C. H. WAYNE, and S. L. RATHJE, for appellee Minnie Christie:

A special act of the legislature cannot, of itself, operate to deprive a citizen of his property. That can only be done by the judgment of one's peers or by the law of the land; and "law of the land" has always been held to be a judicial proceeding, conducted in a court of justice, as distinguished from statutory enactments. *Dorman v. State*, 34 Ala. 237; *Sherman v. Buick*, 32 Cal. 249; *Murry v. Hoboken Land Co.* 59 U. S. 272; *State v. Staten*, 46 Tenn. 233.

An adoption of a child by a husband without the consent of his wife in no way affects her interest as widow in his estate. *Stanley v. Chandler*, 53 Vt. 619.

Where a widow renounces the will of her husband, the law fixes her rights, under such renunciation, in accordance with her intentions. *Gullett v. Farley*, 164 Ill. 566.

A conveyance of an infant is valid until it is avoided after arriving at full age; but the acts of the infant after arriving at full age, inconsistent with the assertion of the privilege of disaffirming, or which fairly indicate that he intends to ratify, will prevent him from disaffirming. 10 Am. & Eng. Ency. of Law, 650.

While an infant is entitled to avoid nearly all contracts, he may, after arriving at full age, waive his privilege of avoidance, and by acts, words or writings ratify or affirm his voidable contracts. 10 Am. & Eng. Ency. of Law, 644.

The courts show a repugnance to set aside a solemn deed at the caprice of an infant; and an infant's deed will be confirmed by any deliberate act, after majority, by which an infant takes a benefit or recognizes its validity. *Irvine v. Irvine*, 9 Wall. 617; *McCormick v. Leggitt*, 8 Jones' L. 425; *Scott v. Buchanan*, 11 Humph. 468.

Ratification by an adult of a contract made by him when a minor is a question of intention. It can be inferred only from his free and voluntary acts or words. *McCarthy v. Carter*, 49 Ill. 56; *Barlow v. Robinson*, 174 id. 317.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

*First*—The decree of the circuit court found that, by the act of March 9, 1867, the appellee, Minnie Christie, was duly and legally adopted as the daughter and heir-at-law of Frederick H. Mather, and his wife, Rhoda E. Mather. The appellee, Minnie Christie, assigns cross-error upon this finding of the decree, and contends that the act in question is unconstitutional and void. The first question, therefore, which is presented for our consideration, is whether the act of adoption, passed by the legislature on March 9, 1867, is valid, or not.

When the act of 1867 was passed, the constitution of 1848 was in force. Section 8 of article 13 of that constitution provides that "no freeman shall be \* \* \* in any manner deprived of his life, liberty, or property, but by the judgment of his peers, or the law of the land." The constitutionality of the act is attacked by counsel for appellee, Minnie Christie, upon the alleged ground that it violates section 8 as above quoted. It is contended, that the private law in question, if it be regarded as binding upon Frederick H. Mather and Rhoda E. Mather, would have the effect of depriving them of their property. The act gives to Minnie Mather "all the rights that would belong or pertain to her were she the daughter of the said Frederick H. Mather and Rhoda E. Mather." It is said that, by the language thus quoted, Mather and his wife are compelled to use their property for the support, education and maintenance of Minnie Mather in all respects, as natural parents would be obliged to do.

The act does not deprive Mather and his wife of any property, but merely directs the manner in which their property shall descend when they die. In other words, the act points out who shall be the heir-at-law of Frederick H. Mather and his wife, and thereby establishes for them and their property a rule of inheritance merely.

The right to inherit and the right to devise are dependent upon acts of the legislature; and there was nothing in the constitution of 1848, as there is nothing in the present constitution of the State, which prohibits a change of the law in reference to these subjects at the discretion of the law-making power. The laws of descent and devise are the creation of statute. (*Kochersperger v. Drake*, 167 Ill. 122). Acts of the legislature cannot be regarded as opposed to the fundamental axioms of the organic law, unless they impair rights which are vested. A mere expectation of property in the future is not a vested right. Hence, rules of descent are subject to change in their application to all estates not already passed to the heir by the death of the owner. "No one is heir to the living." (Cooley's Const. Lim.—6th ed.—pp. 438, 439). The adoption of infants, under statutes authorizing such adoption, does not interfere with or cut off vested rights. Such statutes may operate to change the descent of property at any time before the right of inheritance is fixed as a vested right. They confer upon adopted children the right to inherit, equally and to the same extent as natural heirs can inherit; but they are not, for this reason, unconstitutional, inasmuch as thereby no vested right is infringed. "The legislature may change any rights ordinarily which may be contingent in their nature." (Rodgers on Domestic Relations, sec. 461).

The fact, that the act of 1867 was applicable only to the adoption of a child by a particular individual and his wife, did not make the act invalid under the constitution of 1848, because that constitution did not prohibit special legislation.

It is said, however, by counsel for appellee, that the act in question does not show upon its face, that it was passed at the request, or with the consent, of Frederick H. Mather and Rhoda E. Mather, his wife. The presumption is that it was passed at their request. It is not to be supposed, that the legislature would adopt such an



act without the request, or desire therefor, of the parties affected by it. In *Pace v. Klink*, 51 Ga. 220, an act was passed by the legislature of Georgia in 1850 "to change the name of Matthew R. Brown to Matthew Downer, and to make him a legal heir" of Joseph Downer; and it was there said by the Supreme Court of Georgia: "The presumption is that it was passed at the request of Joseph Downer, and it is to be construed in that view, since it cannot for a moment be supposed, that the legislature would pass such a law, except at the request of the person whose estate and family it operated upon. The act gives to Matthew not only the name of Downer, but declares he shall have all the rights and privileges that he would have had, had he been born the lawful son of the said Joseph." In the Georgia case it was held that, in the distribution of the property of Joseph Downer, the children of Matthew stood in the place of, and represented, the father, and took whatever of said estate he would have taken if living. The presumption, that the act was passed at the request of Mather and his wife, is not overcome by any testimony in the record. On the contrary, the evidence tends to show that Mather and his wife always regarded the appellee, Minnie Christie, as their adopted daughter. She herself testifies, that she was always spoken of as their adopted daughter, and was treated as such. Frederick H. Mather speaks of her in his will as his "adopted daughter." Rhoda E. Mather by her will gives, bequeaths and devises all her property "unto my adopted daughter, Minnie Christie." It cannot be said, therefore, that the act of adoption was not accepted by the parties affected by it. Indeed, it appears that, as far back as September, 1856, when the appellee, Minnie Christie, was only a year old, Frederick H. Mather executed the indenture of service set out in the statement preceding this opinion, by which he obligated himself to teach and instruct her to a certain extent, until she should attain the age of eighteen years.

In view of what has been said, we are unable to agree with counsel for appellee, that the circuit court was wrong in holding the act of adoption to be valid.

Objection is made, that the real name of the appellee was Mary McMahan, while the child adopted was Minnie McMahan. This objection is without force, because the proof shows clearly that Mary McMahan and Minnie McMahan were one and the same person. Although her real name was Mary Adelaide, she was always called Minnie, both by the Mathers, and by their friends and acquaintances. The Mathers had no other child in their family except appellee.

*Second*—The next question, which arises, is as to the validity of the renunciation by Rhoda E. Mather on March 9, 1895, of the provisions of the will of Frederick H. Mather. The theory of the appellee, Minnie Christie, is, that she was not the adopted daughter of Frederick H. Mather and his wife, by reason of the alleged invalidity of the act of adoption; and that, therefore, Frederick H. Mather left no child. If this were true, then the renunciation of Mrs. Mather made after her husband's death would, under section 12 of the Dower act, entitle her to take, absolutely and in her own right, one-half of all the real and personal estate remaining after the payment of her husband's just debts. Counsel for said appellee contend, that the renunciation did have the effect thus indicated, and that, by reason of such renunciation, Mrs. Mather was the owner, when she died, of one-half of the real estate involved in this controversy, and that the appellee, Minnie Christie, as her devisee under her will, became thereby the owner of said half upon the death of Mrs. Mather. The theory thus insisted upon cannot be sustained, for the reason that the adoption of Minnie Christie by the legislative act in question was valid, and, therefore, Frederick H. Mather, when he died, left a child, so that section 12 of the Dower act has no application to this case. The language of that section

is: "If a husband or wife die testate leaving no child or descendants of a child," etc. (Hurd's Rev. Stat. 1897, p. 635). Here, the adopted child, Minnie Christie, was, in the eye of the law, as much the child of Frederick H. Mather, as though she had been his natural child. Consequently, the renunciation amounted to nothing, and did not vest Mrs. Mather with a half interest in the property. The position is well sustained by authority that, inasmuch as the adopted child becomes and is the lawful child of the adopting parent for all the purposes of inheritance from such adopting parent, the widow of a deceased testator, who dies leaving such adopted child, can not elect to take one-half of her husband's real estate under the statute. (*Moran v. Stewart*, 122 Mo. 297; *Power v. Haffley*, 85 Ky. 672; *Atchison v. Atchison's Exrs.* 89 id. 490; *Buckley v. Frazier*, 153 Mass. 525; *In re Newman*, 75 Cal. 219; *Rutt v. Howell*, 50 Iowa, 533; *Keegan v. Geraghty*, 101 Ill. 26; *Sewall v. Roberts*, 115 Mass. 263).

It will be noticed that, by the will of Frederick H. Mather, his widow, Rhoda E. Mather, was entitled to the use for her life of all of his real estate, if she should survive him. She did survive him. It is unnecessary to inquire, whether or not the effect of her renunciation was merely to give her her dower interest in his real estate, that is to say, the use of one-third thereof for life. Whatever interest she had, whether a life interest in all the lands, or a life interest in a third thereof, ceased to exist upon her death. As her renunciation did not have the effect of giving her the title to one-half the lands, it follows that Minnie Belle Sanders and her sister, Bessie Sanders, were, under the will of Frederick H. Mather, the owners each of an undivided one-half of his real estate, subject to the right of their mother, Minnie Christie, to use the same and draw the rents thereof, until Bessie Sanders should arrive at the age of eighteen years.

If the deed executed by Minnie Belle Sanders upon August 8, 1895, was a valid deed, and is allowed to stand

because of any ratification thereof or otherwise, then Mrs. Christie, as grantee in said deed, became the owner of the undivided half interest in the property owned by her daughter, Minnie Belle Sanders. But if said deed should be set aside as having been procured by undue influence, or as having failed of ratification by Minnie Belle Sanders when she became of age, then the property in this suit is owned by the following persons in the following proportions: Bessie Sanders Sayles owns thirteen twenty-fourths of said land, or one-half thereof, as devisee under her grandfather's will, and one twenty-fourth thereof as the heir of her deceased sister; the appellant, Robert Allen Gates, is the owner of an undivided one-fourth thereof as the heir of his deceased wife, who left no children, and he is entitled to dower in the other undivided one-fourth thereof; Minnie Christie is entitled to an undivided two twenty-fourths of said real estate as heir of her deceased daughter, Minnie Belle Sanders Gates; and the three minor children, James Boyd Christie, Mary Rebecca Christie and Mildred Jennie Christie, half-brother and half-sisters of the deceased, Minnie Belle Sanders Gates, are each entitled to one undivided one twenty-fourth part thereof as heirs of their deceased half-sister. The interests thus designated are those which are claimed by the appellant, Bessie Sanders Sayles, in her bill, and by the appellant, Robert Allen Gates, in his cross-bill. The contention, however, of the appellee, Minnie Christie, is that she is the owner of an undivided one-half part of said premises under and by virtue of the will of her deceased mother, Rhoda E. Mather, and, in addition thereto, to an undivided one-fourth part of said premises through the deed executed to her by her deceased daughter, Minnie Belle Sanders Gates, making altogether an undivided three-fourths part of the property in question; and that the appellant, Bessie Sanders Sayles, is the owner only of an undivided one-fourth part of said premises. This contention is based upon the erroneous theory,

that, by reason of the alleged renunciation, Minnie Belle and Bessie took each one-fourth, and not each one-half of the land. It will thus be seen, that the only remaining question to be determined is, whether or not the circuit court was correct in holding, that the deed, executed by Minnie Belle Sanders to Minnie Christie on August 8, 1895, was ratified by the grantor thereof after she became of age; and, whether for that reason, it should be sustained, and not set aside.

*Third*—A woman's minority in this State terminates when she is eighteen years of age; at the age of eighteen she reaches her majority. (*Stevenson v. Westfall*, 18 Ill. 209; *Kester v. Stock*, 19 id. 328; *Keil v. Healey*, 84 id. 104). Minnie Belle Sanders Gates became eighteen years old on August 8, 1896, a little less than one year after her marriage to appellant, Robert Allen Gates, which marriage took place on or about August 14, 1895, when she was seventeen years old. The deed, which she made to her mother, having been made on August 8, 1895, was made one year before she reached her majority, and six days before her marriage.

Conveyances, made by infants in person, are voidable only, to be confirmed or repudiated at their discretion after they arrive at years of majority. (*Cole v. Pennoyer*, 14 Ill. 158; *Walker v. Ellis*, 12 id. 470). A conveyance of real estate by a minor must be disaffirmed and repudiated by him within three years after his majority, or it will be upheld; that is to say, the time, within which an infant after reaching majority must revoke a conveyance made during minority, is the period of three years after arriving at such majority. A neglect or failure to disaffirm the deed within that time will be held to be a ratification of it. (*Blankenship v. Stout*, 25 Ill. 132; *Keil v. Healey*, *supra*). As Minnie Belle Sanders Gates became eighteen years of age on August 8, 1896, she had three years from that date, that is to say, until August 8, 1899, in which she could disaffirm or avoid the deed made to

her mother on August 8, 1895. She died nineteen months after she made the deed, to-wit, on March 17, 1898, and within the period of three years after she reached her majority, and nearly seventeen months before said period of three years expired.

The right to avoid a deed, made during minority, is not one, which is personal to the infant himself, but may be exercised by his heirs, as well as himself. The heirs of an infant may disaffirm his deed within the same time, within which the infant might himself disaffirm it, if he were living. (*Illinois Land and Loan Co. v. Bonner*, 75 Ill. 315; *Wheaton v. East*, 5 Yerg. 41; *Clammorgan v. Lane*, 9 Mo. 473; *Sims v. Eberhardt*, 102 U. S. 300). The appellant, Bessie Sanders Sayles, who filed the original bill in this case, and the appellant, Robert Allen Gates, who filed the cross-bill herein, are heirs of the deceased Minnie Belle Sanders Gates. The right to avoid the deed of the deceased minor belongs to them as such heirs, just as it belonged to the deceased before her death. The original bill in this case, and the cross-bill herein, were both filed in January, 1899; they were, therefore, filed within three years after the deceased minor attained her majority. The minor children above named of Mrs. Christie are also heirs of their deceased half-sister, but they appear by guardian *ad litem* and submit their rights to the court, and are not opposing the relief sought by the bill and the cross-bill herein. It is true, that Mrs. Christie is also an heir of her deceased daughter, but she does not claim the property as such heir, but as grantee under the deed made to her by her daughter.

The filing of the bill in this case to set aside the deed, made on August 8, 1895, amounts to an election on the part of the heirs of the deceased, Minnie Belle Sanders Gates, to disaffirm and avoid the deed so made by her. There are various modes, by which the grantor, after he becomes of age, may disaffirm a deed made by him during his minority. Such grantor or his heirs may disaffirm

the deed by bringing an action of ejectment for the recovery of the premises after he becomes of age. (*Cole v. Pennoyer, supra*). He or his heirs may disaffirm the deed made during minority by bringing suit to regain possession, or to cancel the deed. (*Tunison v. Chamblin*, 88 Ill. 378). This is a bill to cancel the deed.

The proof does not show that, before her death, Minnie Belle Sanders Gates did anything to disaffirm or avoid the deed made by her. If she did not ratify the deed after she became of age, then the present appellants have the right, by the filing of the present bill, to disaffirm the deed. It is claimed, however, on the part of appellee, Minnie Christie, that her deceased daughter ratified the conveyance made to her mother after she became of age on August 8, 1896. Whether this is so or not requires an examination of the evidence upon the subject of ratification.

*Fourth*—When Minnie Belle Sanders made the deed to her mother on August 8, 1895, she was a minor living with her mother and under the control and influence of her mother. There was no consideration whatever for the deed although one is named therein. It was purely and simply a gift from a minor daughter to her mother. The proof is clear and conclusive, that the property of an undivided half of which the deceased was then the owner, subject to the right of her grandmother to use the same for life, and, after her death, subject to the right of her mother to use the same until her sister Bessie should become eighteen years old, was worth in the neighborhood of \$53,000.00. Here, then, was a gift by a minor child to its parent of property worth more than \$26,000.00. The particular circumstances, under which the deed was executed, will be referred to more at length hereafter. It is sufficient for the present to say, that the relation of child and parent existed between the donor and donee in this case, and that, such relation being in the nature of a fiduciary one, the presumptions are all against the

fairness of the transaction; and the burden of proof is upon the parent to show its fairness. "In the case of a gift from a child to a parent undue influence may be inferred from the relation itself." (*Oliphant v. Liversidge*, 142 Ill. 160). "A child is presumed to be under the exercise of parental influence as long as the dominion of the parent lasts. Whilst that dominion lasts, it lies on the parent maintaining the gift to disprove the exercise of parental influence by showing that the child had independent advice, or in some other way." (2 Pomeroy's Eq. Jur. sec. 962). In *White v. Ross*, 160 Ill. 56, we said: "Whereas in this case, the transaction appears to have been an improvident and unreasonable one for the child to enter into, and one apparently involving the taking of an unconscionable advantage by the parent in accepting and retaining the property, there can be no doubt, from the standpoint of any well considered case, that the burden of proof is cast upon the parent to prove that the transaction was, in the language often used, 'a righteous one.'" Where there is a deed from a child to its parent, particularly from a minor child to its parent, the presumption usual in confidential relations against validity, arises, and is rebuttable by the same evidence. "The transaction is regarded as voidable until affirmative proof of free agency, full knowledge and good faith is produced." (27 Am. & Eng. Ency. of Law, pp. 485, 486). Where the relation of child and parent exists, and the parent obtains by voluntary donation a large pecuniary benefit from the child, the burden of proving that the transaction is righteous falls on the person taking the benefit. (*Hoghton v. Hoghton*, 15 Beav. 278). In such cases, the presumption is that an undue influence has been exercised to procure such gift on the part of the child, and it is the business and the duty of the party, who endeavors to maintain such a transaction, to show that that presumption is adequately rebutted. (*Hoghton v. Hoghton*,



*supra*; *Miskey's Appeal*, 107 Pa. St. 611; *Ashton v. Thompson*, 32 Minn. 25). In *Miskey's Appeal*, *supra*, it was said by the Supreme Court of Pennsylvania that "a transaction between persons so situated is watched with extreme jealousy and solicitude, and if there be found the slightest trace of undue influence or unfair advantage, redress will be given to the injured party."

The appellee, Minnie Christie, seeks to establish a ratification of the deed in question by the testimony of five witnesses. A detective or deputy sheriff, who was in the habit of aiding Andrew J. Christie, the husband of Minnie Christie, who was himself a deputy sheriff, in serving process issued by the courts in DuPage county, says that, some two or three weeks before she died, Minnie Belle Sanders Gates came into a furniture store where he happened to be at the time, to see about some furniture which she had spoken about buying; and that, when he made some allusion to the deed executed by her to her mother, she stated in substance that she was satisfied with having made the deed. Two women, one Mrs. Myers and her daughter, swear that, during the Christmas holidays of 1897, they met the deceased on State street, near Siegel & Cooper's store, where she was then working as a clerk, and that, in reply to a question which one of them asked her about the deed she had made to her mother, she said that she wanted her mother to have that, and that, if anything happened to her, she wanted everything to go to her mother. At the time these statements were made Minnie Christie was not present. Declarations, made to a stranger, do not amount to a ratification in the absence of the person, who is to receive the benefit of such ratification. "A promise \* \* \* to confirm an infant's contract must be made to the party in interest or to his agent." (*Chandler v. Glover's Admr.* 32 Pa. St. 509; *Gillingham v. Gillingham*, 5 Harris, 302; *Goodsell v. Myers*, 3 Wend. 472; 10 Am. & Eng. Ency.

of Law, p. 647). "Declarations to strangers are unavailing." (*Chandler v. Glover's Admr. supra*). Hence, the testimony of these witnesses did not establish a ratification.

The next witness to support the ratification is the appellee, Minnie Christie, herself, who swears that in January, 1898, after her daughter had left Siegel & Cooper's store, where she had been working upon a salary of \$4.00 a week, and had come home to her mother to the house located upon a portion of these premises, she asked her daughter if everything was satisfactory to her, and her daughter replied that it was, and she was glad that she had deeded her property to her mother, that it could not be taken away, and she would be taken care of. Mrs. Christie was an incompetent witness to testify in this case. The appellants, and the infant appellees, are suing and defending as heirs of Mrs. Gates, while Mrs. Christie is claiming all of the property of Mrs. Gates under the deed in question. She is a party defendant to the suit, and the adverse parties suing are the heirs of her deceased daughter. She is claiming to be the owner of the property by another title than that acquired under the Statute of Descent. Where persons are suing or defending as heirs of a deceased person, and against one who claims the entire interest of such deceased person under a deed, the one so claiming is incompetent as a witness in her own behalf under section 2 of the statute in regard to evidence. (*Way v. Harriman*, 126 Ill. 132; *Shaw v. Schoonover*, 130 id. 448; *Shovers v. Warrick*, 152 id. 355; *Bevelot v. Lestrade*, 153 id. 625). Appellants are suing as the heirs of their deceased sister and wife, whose title is here disputed; appellee, Minnie Christie, seeking to disprove such title, is not, therefore, a competent witness. (*Wilson v. Wilson*, 158 Ill. 567). As the appellants are suing as heirs-at-law of Mrs. Gates, from whom they claim the land by descent as intestate estate, and as Mrs. Christie is a party defendant directly interested in the event of the suit, she is not competent to give testimony in her

own behalf as to what occurred between herself and her deceased daughter, tending to defeat the descent of the property to such heirs. (*Stodder v. Hoffman*, 158 Ill. 486). In the late case of *Leavitt v. Leavitt*, 179 Ill. 87, we said: "Where one claims as heir, and seeks to assert his title because of that relation, defendants, who claim under a deed from the ancestor, are not competent witnesses to defeat the right of the heir under the Statute of Descent."

The only remaining witness as to the ratification was a hired man in the service of Mr. and Mrs. Christie, engaged in caring for the lawns and looking after the place where they lived. He states that in September, 1897, he passed through the sitting room of the house where Mrs. Christie lived, and there saw Belle and her mother, the latter "sitting in front of the secretary;" that he "passed by to get something;" he then proceeds as follows: "Whatever it was I got it, and, when I was coming out I heard Belle say: 'Mamma, I am glad that I signed that property over to you.' Well, I did not wait in there to listen." The testimony of this latter witness, standing alone, is not sufficient to establish a ratification. He heard a casual remark to the effect above stated, while passing through the room, but understood nothing about the subject of the conversation. Mere declarations or promises to make a deed of affirmance will not constitute an affirmance. (*Clammorgan v. Lane*, *supra*; *Davidson v. Young*, 38 Ill. 145; 10 Am. & Eng. Ency. of Law, p. 651, note 1). "In order to constitute a ratification of acts done in infancy, the act relied upon as a ratification must be performed with a full knowledge of its consequences, and with an express intent to ratify what is known to be voidable." (*Davidson v. Young*, *supra*). Acts of the infant after arriving at full age, which fairly indicate that he intends to ratify the deed made during minority, will prevent him from disaffirming the conveyance. (10 Am. & Eng. Ency. of Law, pp. 649, 650). It has been said that "ratification by an adult of a contract

made by him when a minor is a question of intention," and that "it can be inferred only from his free and voluntary acts or words." (*McCarty v. Carter*, 49 Ill. 53). But it will be found as to most of the cases, that the utterance of mere words has been coupled with some act, or acts, or with the receipt of some benefit from the deed or contract made in infancy, before such mere words have been held to constitute a ratification of such contract or deed. For example, in *Wheaton v. East*, *supra*, where it appeared that the minor did no act, from which a dissent or disaffirmance might be inferred for three or four years after he reached years of majority, but admitted that he had sold the land, and said he was satisfied, and offered to exchange other lands for it, it was also shown that, in addition to making such admission and such statement and such offer, he saw the purchaser putting improvements on the land and made no objection. So, in the recent case of *Barlow v. Robinson*, 174 Ill. 317, where an infant contracted to sell land to the appellee, and executed a bond obligating herself to convey the same to him when certain payments specified in the bond should have been made by the appellee, it appeared, that the appellee made a cash payment, and entered into the possession of the land under the bond; and it also appeared, that, after the minor arrived at majority, she not only told the appellee that she would stand by the agreement and execute a deed to him when the time should come, but she demanded money of him upon the contract, and wrote a note to him requesting him to pay her \$550.00 upon the contract, and sent the note by her husband, as her agent, to the appellee. In the latter case, besides the mere words, which were uttered, the minor received a part of the purchase money in cash, and sent a note by her agent demanding a further payment of purchase money. All this amounted to more than such mere words, as are relied upon in the present case to constitute a ratification. In *Sims v. Eberhardt*, *supra*, the Supreme

Court of the United States say: "We think the preponderance of authority is that, in deeds executed by infants, mere inertness or silence continued for a period less than that prescribed by the Statute of Limitations, unless accompanied by affirmative acts manifesting an intention to assent to the conveyance, will not bar the infant's right to avoid a deed. But those confirmatory acts must be voluntary. \* \* \* An affirmation or a disaffirmance is in its nature a mental assent, and necessarily implies the action of a free mind exempt from all constraint and disability."

*Fifth*—Where the same conditions exist at the time of the ratification, as existed originally when the contract or deed was made by the minor, and where the same influences and lack of knowledge of the facts exist at the time of the alleged ratification, as existed at the time of the original contract or deed, in such case the ratification is held to be a part of the original transaction and to be ineffectual. (*Roche v. O'Brien*, 1 Ball & B. 330; *Morse v. Royal*, 12 Ves. 355; *Adams v. Bremmer*, 74 N. Y. 539; *Roby v. Colehour*, 135 Ill. 300; Bump & Kerr on Fraud and Mistake, p. 296; *Gilman, Clinton and Springfield Railroad Co. v. Kelly*, 77 Ill. 426). This same principle was announced in *Burt v. Quisenberry*, 132 Ill. 385, in the following words: "Manifestly, a deed made under undue influence is not absolutely void—it is only voidable; and hence the party entitled to avoid it may elect to ratify it, if he will, when the influence, under which it was obtained, has entirely ceased."

The appellee, Minnie Christie, has not introduced any proof whatever in this case to rebut the presumption of undue influence exercised over her daughter arising from the relation which existed between them. In January, 1895, Robert Allen Gates, who was then only twenty-three or twenty-four years old, began to pay his attentions to Minnie Belle Sanders, then sixteen years old. A criminal intimacy between them resulted, and is not

disproved by any of the testimony in the record. In July, or early in August, 1895, as near as we can gather from the record, the existence of this criminal intimacy became known to Mrs. Minnie Christie and her adoptive mother, Mrs. Rhoda E. Mather. The appellant, Gates, was a substitute clerk in the post-office in Chicago, working upon a salary of \$30.00 per month, and Mrs. Meyers went to him in July, in company with Minnie Belle Sanders, for the purpose of persuading him to marry her. According to the testimony of Mrs. Meyers he consented to do so. There is some evidence in the record, tending to show that he was unwilling to marry her, but there is much which tends to prove that he had no objection to marrying her. There is some testimony tending to show that Mrs. Christie refused to consent to her daughter's marriage, unless the latter would execute a deed to her mother conveying all her interest in the estate of Frederick H. Mather. As Minnie Belle Sanders was under eighteen years of age, she could not obtain a license to be married without the consent of her mother. This testimony as to the mother's refusal to give her consent receives confirmation from the fact that, when they did marry on August 14, 1895, they went out of the State, and the marriage ceremony was performed out of the State.

Mrs. Mather, an old lady over eighty years of age, partially paralyzed both in her speech and in her limbs, executed a renunciation of her husband's will in March, 1895, and then, on the same day, made a will devising to her adopted daughter, Minnie Christie, the half of the real estate owned by Frederick H. Mather at his death, the title to which was supposed to have vested in Mrs. Mather by the renunciation. On the evening of August 7, 1895, an attorney not living in Wheaton, DuPage county, was telephoned to to come the next day to the Christie homestead in Wheaton. He, or his partner, or both of them, had been the legal advisers of Mrs. Mather, and had had business with Mr. Christie. One member of the

firm was a witness to the will of Mrs. Mather. On the morning of August 8, 1895, the attorney, so telephoned for, went to Wheaton to the home of Mrs. Christie. He was met at the depot by Mr. Christie. He saw Mrs. Christie and Mrs. Mather. Mrs. Mather stated, that she desired to re-publish her will. She did make then and there a re-publication of her will, but changed it in no respect, except that the witnesses to the re-publication were different from the witnesses to the original will. The attorney telephoned for was one of said witnesses. At the same interview, and after the re-publication of the will, Mrs. Mather stated that her granddaughter, Belle, desired to make a deed of her property to her mother. Mrs. Christie was then called into Mrs. Mather's room, and talked with the attorney about the making of such deed. Minnie Belle Sanders, who was present in the house, was then called in, and the attorney talked to her about the matter of making the deed. Mrs. Mather and Mrs. Christie told him that Belle was in the family way. This turned out not to be the case. It was also stated that Gates was unwilling to marry her, and the question was discussed whether it would be advisable to bring a bastardy proceeding against him. Belle stated that she desired to make a deed to her mother. The fears of this distracted girl, both as to her own condition and as to the danger of public disgrace, were played upon in order to induce her to deed away her estate. A notary, or police magistrate, living some distance away, and not in Wheaton, was then telephoned for and came to Wheaton to take the acknowledgment. The deed was signed then and there by Belle in the presence of her mother, and acknowledged before the police magistrate, and handed to her mother. This deed was never recorded until March 28, 1898, eleven days' after the death of Mrs. Gates. The appellant, Gates, never knew in the lifetime of his wife, that she had made a deed of the property to her mother.

The proof shows very conclusively, that she was in love with the appellant, Gates, and wanted to marry him, and live with him. Her affection for him, and her relations with him, were such that she was willing to part with any property which she owned, in order to become his wife. That her condition of mind, as thus indicated, was the moving cause of her consent to the execution of the deed is the inevitable conclusion to be derived from a careful examination of this record. The execution of the deed by the daughter to the mother, and the execution of a re-publication of her will by Mrs. Mather giving her supposed interest in the property to Mrs. Christie, were parts of one transaction, intended to vest title to three-fourths of the property in Mrs. Christie. One witness swears, that Mrs. Christie said to her: "I had Belle deed her property to me, and I told her, if she did not, they would come on with judgment notes, and take her property away, and she would have none at all." Thus, according to Mrs. Christie's own statement, her daughter was made to believe and, during the rest of her life, continued to believe, that her husband's debts would sweep away her property. This was not true, as matter of fact, although her belief in its truth induced her to allow the deed to stand, and to say nothing about it to her husband. She had no independent adviser as to what her rights were when she executed this deed. The attorney, who drew the deed, and who talked with her about its execution, however upright his own intentions may have been, was the attorney of Mrs. Mather, and of Mr. and Mrs. Christie. They or one of them paid him for his services in drawing the deed. Mr. Christie telephoned for him, met him at the depot when he came to Wheaton, took him to the house, went down town to obtain the blank form upon which the deed was written, and telephoned to the distant magistrate to come and take the acknowledgment. Mrs. Christie and her husband were the moving spirits in the whole transaction, and old



Mrs. Mather and young Belle were but puppets in their hands. It is true, that the attorney told Belle that she might at any time disaffirm the deed, but she was never told when she could disaffirm it, or how long a time she had within which to disaffirm it. They did not explain fully her rights to her. The evidence tends to show that, inasmuch as, under the will of her adoptive grandfather, her mother had the right to the possession of the property until December, 1898, when her sister, Bessie, should become eighteen years of age, she supposed that she could do nothing in the matter of disaffirming her deed until her sister reached that age. Before that time came, she was in her grave. There is nothing in the record to show that she knew the value of the property, or that she knew she could disaffirm her deed when she became of age. The attorney stated to her that she had only a one-fourth interest in the property under her grandfather's will, when, as a matter of fact, she was entitled to one-half of it under that will. Whatever may have been the attorney's view of the law, it still is true that Belle was misinformed as to the extent of her interest. After her marriage she lived with her husband only about twenty-nine days. She worked as a clerk in a store in Chicago, as above stated, for about two months in the fall and winter of 1897. With the exception of these periods she was at home all the time with her mother and under her mother's influence. She was never free to consider the subject of disaffirming her deed after she became of age.

There is some testimony in the record, tending to show that her husband declined to live with her after her marriage and treated her badly, but there is other evidence tending to show that he was fond of her. Several efforts were made by her and her husband to go to house-keeping, but his salary and her salary were so small that they were unable to do so. Their mother was applied to to furnish them \$150.00 to buy furniture to go to house-

keeping, and she refused to give them the money, although she held the title to property deeded to her by her daughter worth more than \$25,000.00.

The alleged ratification of this deed by this young girl, who was ignorant of business and ignorant of her rights, must be looked at and considered in the light of all the circumstances surrounding the original transaction as they have been thus detailed. The evidence shows clearly that her mother was a woman of strong, determined will, and that her daughter's will was weak and under the control of her mother. The influence, which operated upon her mind and induced her to execute the deed, continued to operate upon her mind, when she made the remark sworn to by the hired man as he passed through the room. She had then come home disheartened, and, as one of the witnesses in the record says, "broken-hearted," having left the store where she had worked, and being unable to secure means enough to go to house-keeping with her husband.

The facts of this case are similar to the facts in the case of *White v. Ross*, *supra*, except that, there, the daughter, who made a deed to her mother, had passed the age of majority, while, here, the daughter making the deed was an infant. Hence, the facts of this case bring it within the scope of the doctrine announced in *White v. Ross*, *supra*, where it is said: "The burden of proof is on the mother \* \* \* to show that the daughter acted independently, advisedly and of her own free, intelligent will and accord, uninfluenced by the recipient of so munificent a gift, and no such proof having been made, that, independently of any question of actual fraud, the transaction must be held to be constructively fraudulent, and that a court of equity will raise a constructive trust and fasten it upon the conscience of the holder of the legal title, and convert such holder into a trustee for the party who, in equity, is regarded as the beneficial owner." As the deed in that case was set aside for the reasons there-

in stated, so, here, the deed must be set aside for the same or similar reasons. The relief, prayed for by the original and cross-bills, should have been granted by the court below.

Under all the circumstances we are unable to come to any other conclusion than that there was no real valid and binding ratification of this deed on the part of the deceased Mrs. Gates. Accordingly, the decree of the circuit court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed. . . . *Reversed and remanded.*

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WILLIAM L. WALLEN

v.

E. A. CUMMINGS.

*Opinion filed October 19, 1900.*

This case is controlled by the decision in *Wallen v. Moore*, (*ante*, p. 190.)

*Wallen v. Cummings*, 88 Ill. App. 45, affirmed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. FARLIN Q. BALL, Judge, presiding.

GEORGE E. LEONARD, for appellant.

ULLMANN & HACKER, for appellee.

Per CURIAM: The questions for decision in this case are the same as those decided in *Wallen v. Moore*, (*ante*, p. 190.) That decision must control this. The judgment of the Appellate Court will accordingly be affirmed.

*Judgment affirmed.*

BRIDGET MITCHELL, EXRX.

v.

JOHN KING.

*Opinion filed October 19, 1900.*

1. APPEALS AND ERRORS—*technical judgment not required to make Appellate Court's judgment final.* A technical judgment is not required to make a judgment of the Appellate Court final, but it is sufficient if the order made by the court ends the controversy between the parties in the particular suit.

2. SAME—*common law writ of error coram nobis has been abolished by statute.* By section 66 of the Practice act the common law writ of error *coram nobis* has been abolished, and errors of fact which at common law might have been corrected by such writ, may, under the statute, be corrected in the court where they occurred, upon motion in writing, at any time within five years after judgment.

3. SAME—*when judgment of the Appellate Court is reviewable on error.* A judgment of the Appellate Court which reverses a judgment of the lower court denying a motion, in the nature of a writ of error *coram nobis*, to cancel a judgment, and remands the cause with direction to the lower court to cancel the judgment in accordance with the motion, is a final judgment, reviewable on writ of error.

4. PARTIES—*section 10 of the act on abatement of actions construed.* Section 10 of the act on abatement, (Rev. Stat. 1874, p. 97,) which provides for the substitution of the personal representative in the case of the death of a sole plaintiff, does not authorize any action to be taken in the case until the death of the plaintiff is suggested and the legal representative substituted.

5. PRACTICE—*when motion in nature of writ of error coram nobis is proper.* The issue and service of process in the plaintiff's name after his death and before the substitution of the legal representative is an error of fact, which may be corrected by the motion substituted by the Practice act for writ of error *coram nobis*.

6. SAME—*when failure to plead in abatement is not an abandonment of right.* The abandonment or waiver of the right to plead matters in abatement by filing a plea which is later in order cannot arise if there is no appearance or plea, but only judgment by default.

7. SAME—*when judgment by default should be canceled upon motion.* That a defendant did not plead in abatement that the plaintiff was dead and no legal representative substituted when process was issued and served, does not affect his right to have the judgment by default, rendered after the representative was substituted, canceled upon motion, if there is no allegation in the declaration of the existence of plaintiff which would be admitted by default.

*King v. Mitchell*, 83 Ill. App. 632, affirmed.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on writ of error to the Superior Court of Cook county; the Hon. JONAS HUTCHINSON, Judge, presiding.

KICKHAM SCANLAN, and EDGAR L. MASTERS, for plaintiff in error:

A mere motion to vacate a judgment at a term subsequent to the judgment term cannot be disguised as a motion in the nature of a writ of error *coram nobis*. *Coursen v. Hixon*, 78 Ill. 341; *Fix v. Quinn*, 75 id. 232; *McKindley v. Buck*, 43 id. 488.

It is the duty, under the law, of a live defendant to plead in abatement the death of the plaintiff. *Life Ass. of America v. Fassett*, 102 Ill. 315; *Mills v. Bland*, 76 id. 381; *Camden v. Robertson*, 2 Scam. 507.

The error in the summons, if any, was cured by the Statute of Amendments and Jeofails. *Hurd's Stat.* chap. 7, sec. 6, div. 1, 10, 14.

The rule in this State is that a defendant must plead in abatement the death of the plaintiff. *Camden v. Robertson*, 2 Scam. 507; *Mills v. Bland*, 76 Ill. 381; *Railway Co. v. Munger*, 78 id. 300; 1 Chitty's Pl. 448.

A judgment in favor of a dead man or against a dead man is not void but voidable. *Freeman on Judgments*, sec. 153; *Clafin v. Dunne*, 129 Ill. 245; *McMillan v. Hickman*, 35 W. Va. 705; *Powell v. Washington*, 15 Ala. 803; *Danforth v. Danforth*, 111 Ill. 236.

The motion to vacate the judgment was, in effect, that the plaintiff was disabled to sue. But this, being a plea of the second order, admitted the jurisdiction of the court, and hence the motion to vacate for the want of jurisdiction of the court could not succeed. 1 Chitty's Pl. 441.

When the defendant pleads to the person of the plaintiff he admits the court's jurisdiction. 1 Chitty's Pl. 441.

After the term has passed at which judgment is rendered the court has no jurisdiction over the record. The

case is off the docket and parties are out of court. *Cook v. Wood*, 24 Ill. 295; *Oetgen v. Ross*, 36 id. 335; *Scales v. Labar*, 51 id. 232; *Cox v. Brackett*, 41 id. 222; *Fix v. Quinn*, 75 id. 232.

The writ of error *coram nobis*, and the motion substituted therefor, under section 66 of the Practice act, do not lie when the party complaining knew of the fact complained of and could have taken advantage of the alleged error on the trial. 5 Ency. of Pl. & Pr. 29; *Marble v. VanHorn*, 53 Mo.App. 361; *Jackson v. Milsom*, 6 Lea, 515.

The facts showing a want of capacity to sue on the part of the plaintiff should be set up by a plea in abatement. *Pierrepoint v. Loveless*, 4 Hun, 966.

A summons sued out in the name of a dead man is not void. *Challenor v. Niles*, 78 Ill. 78.

OTIS & GRAVES, and HALEY & O'DONNELL, for defendant in error:

All errors of fact committed by a court of record in Illinois, which, by common law, could have been corrected by the writ of error *coram nobis*, may be corrected by motion in the court where the error was committed, at any time within five years after rendition of final judgment. Rev. Stat. sec. 66, chap. 110; *Beaubien v. Hamilton*, 3 Scam. 213; *Peak v. Shasted*, 21 Ill. 137; *Mains v. Cosner*, 67 id. 536; *Claflin v. Dunne*, 129 id. 241; *Hall v. Davis*, 44 id. 494.

Where there is but one plaintiff in an action at law, and he dies before judgment, the suit does not abate, but the person to whom the cause of action survives, may, upon suggesting the death, be substituted as plaintiff and prosecute the same. Rev. Stat. sec. 10, chap. 1.

Entering orders in a case while a party thereto is dead, and before substitution of his legal representative, is an error of fact, and can only be corrected in the court where the error was committed. 2 Tidd's Pr. 1136, 1167; *Life Ass. v. Fassett*, 102 Ill. 315; *Claflin v. Dunne*, 129 id. 241.

Upon the death of a sole plaintiff all proceedings are suspended, and, while the suit does not abate, no action

can be taken except to suggest the death and obtain an order substituting the legal representative. *Riley v. Hart*, 130 N. Y. 625; *Green v. McMurty*, 20 Kan. 190; *Jarvis v. Felch*, 14 Abb. Pr. 48; *Hurst v. Fisher*, 1 W. & S. 438; *Day v. Hamburg*, 1 Brown, 75; *Case v. Ribelin*, 1 J. J. Marsh. 29; *Reed v. Butler*, 11 Abb. Pr. 128.

A void summons gives no jurisdiction of the person of a defendant. A defendant who has been personally served with a void writ may disregard the same, and afterward be relieved against a judgment based thereon, in any court of competent jurisdiction. Disregard of service of such process creates no estoppel against defendant and divests him of no legal right. *Matthews v. Hoff*, 113 Ill. 90; *Culver v. Phelps*, 130 id. 217; *Schmidt v. Devine*, 164 id. 537.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

On February 24, 1896, a summons was issued by the clerk of the superior court of Cook county, returnable at the March term, 1896, at the suit of John Mitchell, against John King, the defendant in error. On March 26, 1896, a declaration was filed. Said summons was not delivered to the sheriff until April 14, 1896, when it was endorsed, "Received too late for service," and returned, and an *alias* summons was issued on that day. The latter summons was returned, "The defendant not found," and on May 21, 1896, a third summons was issued, which was returned June 1, 1896, in the same manner. On September 28, 1896, a fourth summons was issued, which was returned, "Received too late for service." Nothing further had been done in the case when the plaintiff, John Mitchell, died, February 19, 1898. The suit was in assumpsit, which survived to the plaintiff in error, as executrix, but the death of the plaintiff was not suggested or the executrix substituted as plaintiff, as might have been done under the statute. Several months afterward, on August 5, 1898, a fifth summons was taken out in the name of the deceased

plaintiff, returnable at the September term, 1898, which began on the first Monday of that month, and this summons was served on the defendant August 18, 1898. Nothing was done at the September term, but at the October term, on October 8, 1898, the plaintiff in error, Bridget Mitchell, executrix of the deceased plaintiff, appeared and suggested his death upon the record, and it was ordered that the cause proceed in her name. Thereupon the defendant, who had not appeared, was defaulted, the plaintiff's damages were assessed at \$8000, and judgment was entered for that amount and costs. On November 21, 1898, the defendant entered his appearance for the purposes of a motion to vacate the judgment, and moved the court to vacate and set aside the same. On the hearing of the motion these facts were shown, from which it appeared that the plaintiff, John Mitchell, had been dead for some time when the summons of August 5, 1898, was sued out and served upon the defendant. The superior court overruled the motion to vacate the judgment, and King appealed to the Appellate Court, which reversed the order overruling the motion, and remanded the cause, made on the motion, to the superior court, with directions to vacate and set aside the judgment. Bridget Mitchell, executrix of John Mitchell, has sued out a writ of error from this court to review the judgment of the Appellate Court.

Defendant in error has moved the court to dismiss the writ of error on the ground that it will not lie for want of finality in the judgment. The claim is that the controversy is not ended, but that plaintiff may still prosecute her suit against defendant by having process served upon him, and that the judgment of the Appellate Court is only a single step in the proceeding. A writ of error may be prosecuted to review a judgment of the Appellate Court where such judgment is final, or where the judgment, order or decree is such that no further proceeding can be had in the court below except to carry into effect



the mandate of the Appellate Court. (Hurd's Stat. 1897, chap. 110, sec. 90.) A technical judgment is not required to make the judgment of the Appellate Court final, but it is sufficient if it concludes or ends the controversy between the parties in the particular suit. The particular controversy which was before the Appellate Court in this case arose upon a motion which our statute has substituted for the writ of error *coram nobis*. At common law there were writs of error for the correction of errors of law and of fact. If the error alleged was apparent upon the face of the record it was the error of the court, and the writ was sued out from a court of superior jurisdiction, and commanded that the record be sent to the court of appellate jurisdiction. If the error alleged was one of fact not apparent upon the face of the record it was not the error of the court, but it was presumed that the court would not have rendered the judgment if it had been cognizant of the fact, and the assignment of error was heard in the same court where the error was alleged to have been committed. By our statute the writ of error *coram nobis* has been abolished, and errors in fact committed in the proceedings of any court of record, and which by the common law could have been corrected by said writ, may be corrected by the court in which the error was committed, by motion in writing. (Rev. Stat. chap. 110, sec. 66.) But while the statute abolished the writ it did not abolish the essentials of the proceeding, which, in nature, remains the same. A writ of error is a new suit, in which original process is issued and served and new pleadings are made up. The assignment of error stands in the place of the declaration, and it is still necessary, in the form of a motion, to allege and show an error in fact, and for the opposite party to have notice. The defendant may, of course, admit the matter alleged and submit the question of error to the court as a matter of law, or may deny the fact, or plead the Statute of Limitations against the motion. In either case an

issue is made up and there must be a finding and a judgment. If the alleged error is proved and there is judgment for the plaintiff in error, it is that for such error the judgment be recalled and annulled. In this case there was judgment against the party making the motion in the superior court, and the issue made by the motion was taken to the Appellate Court. The original case was not in the Appellate Court, but only the motion in the nature of the writ of error *coram nobis*. The judgment of the superior court was reversed by a judgment in the Appellate Court, which was final upon the issues presented on the motion. The superior court was directed to cancel the judgment of \$8000, and the judgment of the Appellate Court leaves nothing for the superior court to do except to carry into effect the mandate. The judgment settles finally the issues made in that case and destroys the judgment. Those issues can never be re-litigated in any form. We are of the opinion that the judgment of the Appellate Court is reviewable upon a writ of error, and the motion to dismiss is denied.

At common law an action abated on the death of the plaintiff, and a judgment in the name of a plaintiff who died before verdict might be reversed by the writ of error *coram nobis*. (2 Tidd's Pr. sec. 1136.) The action does not now abate if it is of such a character as to survive, and the statute provides: "When there is but one plaintiff, petitioner or complainant in an action, proceeding or complaint, in law or equity, and he shall die before final judgment or decree, such action, proceeding or complaint shall not on that account abate, if the cause of action survive to the heir, devisee, executor or administrator of such decedent, but any of such to whom the cause of action shall survive, may, by suggesting such death upon the record, be substituted as plaintiff, petitioner or complainant, and prosecute the same as in other cases." (Rev. Stat. sec. 10, chap. 1.) The suit in this case was begun in the lifetime of John Mitchell, and the court acquired juris-

diction of him and of the subject matter, but at his death had not acquired jurisdiction of the defendant. In case of the abatement of an action at law the suit is dead and cannot be revived or continued by any proceedings. Under the statute the suit in this case was not destroyed, but the executrix had the privilege of suggesting the plaintiff's death and being substituted as plaintiff so as to continue the suit. The statute does not authorize the court to proceed without a plaintiff, and does not authorize any action to be taken until the death is suggested and the legal representative substituted. In every suit there must always be a plaintiff, a defendant and a court. The employment of plaintiff's attorneys and their authority was revoked by the death, and the issue and service of process before the substitution of the executrix was unauthorized by law. It constituted an error in matter of fact existing outside of the record and not apparent upon its face. The error was of the same nature as those errors which might be corrected at common law by the writ of error *coram nobis*, and which may now be corrected on the motion.

It does not seem to be seriously contended that the issue and service of process, when there was no plaintiff but a mere right under the statute to make a new plaintiff, was not erroneous, but the principal argument is that it was an error for which there is no remedy, because the defendant did not appear and plead in abatement that plaintiff was dead when the writ was issued and served. It is not denied that he might have appeared and filed such a plea, which must have been sustained. To say that he must do so would be to say that such an error could never be corrected by the writ of error *coram nobis*, while in the text books and numerous decisions it has been said that a judgment in favor of a dead man may be reversed by such a writ. (Freeman on Judgments, sec. 153; *Stoetzell v. Fullerton*, 44 Ill. 108; *Claflin v. Dunne*, 129 id. 241; *Hurst v. Fisher*, 1 W. & S. 438; *Greene v. McMurtry*,

20 Kan. 189; *Case of Rubelin*, 1 J. J. Marsh. 29; *Day v. Hamburg*, 1 Brown, (Pa.) 75; Tidd's Pr. *supra*.) There is no law which compels a defendant to appear in court when served with ordinary process of summons in a civil suit. If he does not appear and is defaulted, he, of course, takes the consequences of his default. A default admits the cause of action, the truth of the allegations set out in the plaintiff's declaration, and the capacity averred in which the plaintiff brings his suit. In this case, at the time of the default the executrix had been substituted as plaintiff, and the default admitted that she was executrix and admitted the allegations of the declaration, but there was no allegation of the existence of the plaintiff at the time the writ was issued or served. The default had no effect as to the error of fact alleged in the motion. The failure to appear, and the consequent default, certainly did not admit a fact nowhere apparent on the record or alleged by the plaintiff. We do not see how the defendant could be called upon to appear and answer to a summons erroneously issued and served when there was, in fact, no plaintiff. A defendant does not make defective process or service good by refusing to recognize it or appear. It is an appearance, and not a failure to appear, that cures an error or defect of that kind. If a defendant appears in answer to a summons, the law fixes a certain order in which he may plead, and if he fails to plead in abatement but files a plea which is later in such order, he waives the right which he would have had under a plea in abatement. The abandonment arises from the failure to plead after appearing, but where there is no appearance and no plea there can be no waiver of that kind.

There have been cases where this well settled rule has been applied, and these are cited by counsel for plaintiff in error, but they have found none in which the rule or reasoning can be applied to this case. In *Camden v. Robertson*, 2 Scam. 507, an action of debt was brought by three plaintiffs, and the defendant appeared and pleaded *nil*

*debet* and payment. Issues were made up on these pleas, and on a trial defendant was allowed to prove that one of the plaintiffs was dead at the commencement of the suit. It was necessarily held that the evidence was inadmissible under the pleadings, and that the defendant who had appeared could not avail himself of the fact except by plea in abatement. In *Mills v. Executors of Bland*, 76 Ill. 381, the death of the plaintiff, Elizabeth Bland, was suggested and her executors substituted and an amended declaration filed, to which the defendants pleaded the general issue. The defendants then asked time to prepare an affidavit that the original plaintiff was dead before the suit was brought, which the court refused. There is no question that where a party pleads he can only plead such a fact in abatement, and it was held that defendants were in no position to take advantage of the fact because they had already filed the plea in bar. In *Bunker v. Green*, 48 Ill. 243, a plaintiff died after verdict, pending a motion for a new trial, and the court, upon overruling the motion, rendered judgment *nunc pro tunc* and in some way got the judgment before the verdict. No one was injured by it, and there was no question of the judgment having become a superior lien upon real estate. The parties were in court, and the error was not one which required a reversal. *Stoetzell v. Fullerton*, *supra*, was a suit in ejectment by Fullerton, and the defendants appeared. On the trial the defendants showed that the title of plaintiff, Fullerton, was divested under a judgment against him. The court permitted Fullerton, by way of collateral attack on the judgment, to show that Nathaniel Church, one of the plaintiffs in the suit against him, died pending the suit. This court said the death of Church pending the suit might have been pleaded in abatement, but Fullerton chose rather to try the suit upon its merits under the plea of the general issue; that under such plea he could not show the death of one of the plaintiffs, and he surely could not be allowed to give evidence of the fact

in another action and by that proof nullify the judgment. In *Challenor v. Niles*, 78 Ill. 78, which was a *scire facias* to revive a judgment, it was objected in this court that the *scire facias* having been issued in the name of the plaintiff in the judgment, who had died, was void. The defendant had pleaded in abatement on a different ground. Concerning the fact of the writ of error issuing in the name of the deceased plaintiff, the court said it was irregular, but an amendment had been allowed and the administrator substituted. Apparently the fact that the death occurred before the writ issued was not shown of record, and the court might properly have said that it could not be considered on error. It has nothing to do with this question. On the other hand, in the cases before cited, this court has affirmed the doctrine that such an error may be corrected by the method here adopted, and in *Clafin v. Dunne*, *supra*, the court quoted with approval from Freeman on Judgments, (sec. 153,) as follows: "Judgments for or against deceased persons are not generally regarded as void on that account, \* \* \* and while the court ought to cease to exercise its jurisdiction over a party when he dies, its failure to do so is an error to be corrected on appeal if the fact of the death appears upon the record, or by writ of error *coram nobis* if the fact must be shown *aliunde*."

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

Subsequently, a petition for a rehearing having been granted, the following additional opinion was filed:

Per CURIAM: Since the rehearing was granted in this case, we have given further consideration to the questions involved, and entertain the same views as those expressed in the foregoing opinion. Said opinion is accordingly re-adopted, and it is ordered that the same be re-filed, and that the judgment of affirmance heretofore entered herein be re-entered as the judgment of this court.

## THE WEST CHICAGO STREET RAILROAD COMPANY

v.

LEAH LIDERMAN.

*Opinion filed October 19, 1900.*

1. APPEALS AND ERRORS—*when right to have refusal of peremptory instruction reviewed is not waived.* If an instruction to find for the defendant is asked and refused at the close of the plaintiff's evidence and again at the close of all the evidence, the defendant does not, by submitting the case to the jury under general instructions, waive the right to assign the action of the court in refusing such instruction as error on appeal.

2. NEGLIGENCE—*doctrine of comparative negligence does not prevail in Illinois.* One who seeks to recover damages for another's negligence has the burden of proving not only the negligence of the defendant as charged in the declaration, but also that his own negligence or misconduct has not concurred with that of the defendant in producing the injury.

3. SAME—*right of person to risk his life to save another's—rule and exception.* The law will not impute contributory negligence to one who places himself in peril to save the life of another, unless his action, in the judgment of all prudent persons, would be deemed rash; but an exception to this rule exists where the party acting is affirmatively responsible for the perilous position of the one whom he attempted to rescue.

4. SAME—*whether party acted rashly is ordinarily for jury.* Whether one who was injured while attempting to save another's life acted rashly or with reasonable prudence is a question for the jury, under all the facts and circumstances in evidence, if reasonable minds would differ on that point.

5. SAME—*the duty of parents in cities to guard children against street dangers.* Parents in cities must guard their children against known dangers to them when upon the street unattended, but the standard of such care is not capable of being defined by law and must depend upon the circumstances of each case, since it is not negligence *per se* to permit children to be upon the streets of a city.

6. SAME—*right of mother to attempt to rescue child from danger.* A mother whose child has momentarily escaped from her care when upon the street may reasonably presume that if the child is exposed to danger others will not negligently injure it, and upon seeing it suddenly so exposed has the right to make all reasonable efforts to rescue it.

*West Chicago Street R. R. Co. v. Liderman*, 87 Ill. App. 638, affirmed.

187	463
98a	*111
187	463
99a	*316
187	463
101a	*306
187	463
205	*646
187	463
208	*499
187	463
211	*351

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. SAMUEL C. STOUGH, Judge, presiding.

JOHN A. ROSE, LOUIS BOISOT, Jr., (W. W. GURLEY, of counsel,) for appellant:

In an action on the case for injury to the person it is necessary to allege and prove ordinary care on the part of the plaintiff. *Railroad Co. v. Grimes*, 13 Ill. 585; *Calumet Iron and Steel Co. v. Martin*, 115 id. 368; *Abend v. Railroad Co.* 111 id. 202; *Railroad Co. v. Evans*, 88 id. 64; *Railroad Co. v. Louis*, 138 id. 9; *Railroad Co. v. Nowicki*, 148 id. 29; *Railroad Co. v. Levy*, 160 id. 385; *Railroad Co. v. Chancellor*, 165 id. 438.

Whether, in an action on the case for injury to the person, there is evidence tending to show ordinary care on the part of the plaintiff is a question for the court. *Simmons v. Railroad Co.* 110 Ill. 340; *Railroad Co. v. Nowicki*, 148 id. 29; *Railway Co. v. O'Conner*, 115 id. 254; *Railroad Co. v. Chancellor*, 165 id. 438.

Although there may be some evidence tending to support the plaintiff's case, yet if the entire evidence, with all reasonable inferences that may be drawn therefrom, is insufficient to support a verdict for the plaintiff, the court should direct a verdict for the plaintiff. *Simmons v. Railroad Co.* 110 Ill. 340; *Railway Co. v. O'Conner*, 115 id. 254; *Bartelott v. Bank*, 119 id. 259; *Rack v. Railway Co.* 173 id. 289; *Martin v. Chambers*, 84 id. 579; *Phillips v. Dickerson*, 85 id. 11; *Frazer v. Howe*, 106 id. 563.

If the trial court in such a case refuses to take the case from the jury, such refusal constitutes reversible error. *Railroad Co. v. Chancellor*, 165 Ill. 438.

To go upon a street car track, in front of a rapidly approaching car, where it appears that the person so doing must be struck by the car unless it is stopped or slackened in speed, constitutes contributory negligence



as a matter of law. *Rack v. Railway Co.* 173 Ill. 298; *Ogier v. Railroad Co.* 34 N. Y. Supp. 867; *Kierzenkowski v. Traction Co.* 184 Pa. St. 459; *Pletcher v. Traction Co.* 185 id. 147; *Reynolds v. Railroad Co.* 28 N. Y. Supp. 734; *Callery v. Transit Co.* 185 Pa. St. 176; *Hamilton v. Railroad Co.* 26 N. Y. Supp. 754; *Bello v. Railroad Co.* 35 id. 831; *Ledman v. Dry Dock Co.* 50 id. 895; *Weiss v. Railway Co.* 53 id. 449; *Brady v. Traction Co.* 42 Atl. Rep. 1054; *Adams v. Railroad Co.* 58 N. Y. Supp. 543; *Williamson v. Railway Co.* 60 id. 477; *O'Rourke v. Railroad Co.* 25 So. Rep. 323; *Railway Co. v. Carey*, 56 Ind. 396.

Attempt to save life is not an excuse for voluntary exposure to danger, when the person to be saved was exposed to danger through the negligence of the one injured. *Railway Co. v. Leach*, 91 Ga. 419; *Railroad Co. v. Hiatt*, 17 Ind. 102.

In the absence of explanatory circumstances it is negligence, as a matter of law, to allow a child of tender years to go unattended upon a city street. *Callahan v. Bean*, 9 Allen, 401; *Chicago v. Starr*, 42 Ill. 174; *Clinton v. Beer Co.* 164 Mass. 514; *Lowery v. Ice Co.* 55 N. Y. Supp. 707; *Glassey v. Railroad Co.* 57 Pa. St. 172; *Hartfield v. Roper*, 21 Wend. 615.

The fact that the child's mother is busy talking to a friend is not such a circumstance as will excuse her from negligence in allowing the child to slip away from her care into the street. *Grant v. Fitchburg*, 160 Mass. 16.

NELSON MONROE, for appellee:

By introducing evidence and having the court give numerous instructions upon the law of negligence, contributory negligence, due care of the plaintiff, etc., based upon the assumption that there was a conflict of evidence, *pro* and *con*, upon these alleged matters of fact, after the refusal by the court of a peremptory instruction to find the defendant not guilty, appellant waived the right to assign such refusal as error, and is precluded and estopped from asking that the question be examined

into by this court. *Railway Co. v. McCallum*, 169 Ill. 240; *Railway Co. v. Delaney*, 169 id. 427; *Wright v. Avery*, 172 id. 313; *Vallette v. Bilinski*, 167 id. 565; *Railway Co. v. Lups*, 74 Ill. App. 420; *Pierce v. Walters*, 164 Ill. 560.

In the case at bar, if the fact appellee permitted her child to stray from her can be called negligence, it was passive negligence only, and it was a question of fact for the jury to determine whether appellee, in the care of and rescue of her child, exercised due care and caution under all the circumstances. The law will not impute negligence. 1 *Shearman & Redfield on Negligence*, (5th ed.) sec. 72, and authorities cited; *Beach on Cont. Negligence*, (3d ed.) sec. 42, and authorities cited; *Creed v. Randall*, 156 Mass. 29; *Eckert v. Railroad Co.* 43 N. Y. 503; *Railway Co. v. Meixner*, 160 Ill. 324; *Chicago v. Major*, 18 id. 360; *Bliss v. South Hadley*, 145 Mass. 91; *Slattery v. O'Connell*, 153 id. 95; *Spooner v. Railroad Co.* 115 N. Y. 22.

Where, on a conceded state of facts, a different conclusion would reasonably be reached by different minds, negligence is a question of fact. *Railway Co. v. Meixner*, 160 Ill. 324; *Eckert v. Railroad Co.* 43 N. Y. 503; *Railway Co. v. Stout*, 53 Ind. 143.

It is not contributory negligence in a mother to attempt to rescue her infant child from an approaching train, although she may have negligently allowed it to go upon the track. *Donahoe v. Railway Co.* 83 Mo. 56; *Ihl v. Railway Co.* 47 N. Y. 204; *Spooner v. Railroad Co.* 115 id. 22; *McGarry v. Loomis*, 63 id. 104; *Cosgrove v. Ogden*, 49 id. 255; *Railway Co. v. Lang*, 75 Pa. St. 257; *Chicago v. Major*, 18 Ill. 360; *Reiley v. Railway Co.* 94 Mo. 601; *Bliss v. South Hadley*, 145 Mass. 91; *Creed v. Randall*, 156 id. 29; *Slattery v. O'Connell*, 153 id. 95.

Mr. JUSTICE WILKIN delivered the opinion of the court:

Appellee recovered a judgment against appellant in the superior court of Cook county in an action on the case for personal injuries, which has been affirmed by the

Branch Appellate Court for the First District. The declaration charged both negligence and willful misconduct by the employees of the defendant, causing the injury sued for. It was not, however, claimed upon the trial, nor is it now, that the act was wanton or willful. The first additional count states the cause of action sued for, as follows: That while the plaintiff, with due care, was going upon a street and the track of the defendant to rescue her infant child from being run over and injured by an approaching train of defendant's cars, defendant negligently operated said train so that the grip-car ran against plaintiff, throwing her to the ground and injuring her.

The accident occurred on July 19, 1897. Plaintiff then lived at 447 Halsted street, on which the defendant operated a line of cable cars. On that afternoon she went to a grocery store on the opposite side of the street, a short distance north of her residence, taking with her a child about three years of age. As she came out of the store she stopped on the sidewalk to speak to a friend whom she met there. She at first held the child by the hand, but during the conversation unconsciously let go of it, and a moment later, as she testified, saw it upon the street car track and a car approaching at the usual rate of speed, some eighty or ninety feet away. She instantly ran toward the child, throwing up her hands and crying out to stop the car. Another person saw the danger to the child and called to the gripman in charge of the car to stop. The evidence is conflicting as to whether he was guilty of negligence in failing to stop the car before the collision, and also whether the child was upon the track or in actual danger at the time plaintiff ran in front of the car. It is admitted, however, that these and all other controverted questions of fact, except due care on the part of the plaintiff, have been settled adversely to defendant below. On this branch of the case it is earnestly contended that the evidence neither proved nor tended to prove that fact, and therefore the trial court

erred in refusing instructions asked by the defendant to take the case from the jury, and this is the only point of controversy in this court.

Counsel for appellee, relying upon the case of *Peirce v. Walters*, 164 Ill. 560, and later cases to the same effect, insists that defendant, by submitting its case to the jury on the evidence and instructions as to the law, waived the right to assign error upon the refusal of its peremptory instructions. The position is without force and wholly unsupported by the cases cited. Here an instruction to return a verdict of not guilty was asked and refused at the close of plaintiff's testimony, and again at the conclusion of all the evidence. It was not until after the refusal of the latter that the defendant company proceeded to submit general instructions to be given the jury. This has always been held to properly raise the question of law whether there is any evidence in the record fairly tending to prove a plaintiff's case. In the cases cited the only request to instruct the jury to find for the defendant was found in a series of instructions asked when the case was submitted to the jury.

Counsel for appellee, though insisting that plaintiff below was shown to have been in the exercise of due care for her personal safety at the time of the accident, insists upon the rule of law held in some jurisdictions to apply in such actions, "that the contributory negligence of the party injured will not defeat the action, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence." Such has never been the law in this State. Here the rule is: "Where a party seeks to recover damages for a loss which has been caused by negligence or misconduct, he must be able to show that his own negligence or misconduct has not concurred with that of the other party in producing the injury; and the burden of proof is upon the plaintiff to show not only negligence on the part of the defendant, but also that he exercised

proper care and circumspection, or, in other words, that he was not guilty of negligence." *Aurora Branch Railroad Co. v. Grimes*, 13 Ill. 585; *Indianapolis and St. Louis Railroad Co. v. Evans*, 88 id. 63; *Abend v. Terre Haute and Indianapolis Railroad Co.* 111 id. 202; *Calumet Iron and Steel Co. v. Martin*, 115 id. 358; *North Chicago Street Railway Co. v. Louis*, 138 id. 9; *Illinois Central Railroad Co. v. Nowicki*, 148 id. 29, and later cases.

The question, then, for our decision upon this record must be, did the evidence produced upon the trial, with all its reasonable intendments, justify the jury in concluding that the plaintiff was, under all the circumstances, in the exercise of reasonable care for her own safety at the time she received the injury sued for. It may—we think must—be conceded that, leaving out of view the peril of her infant child, she was guilty of such contributory negligence as would defeat the action. Counsel for appellant admit that the general rule is that a person has a right to risk his own life or limb in an effort to save the life of another person, and cannot be charged with contributory negligence in so doing.

In *Eckert v. Long Island Railroad Co.* 43 N.Y. 502, (3 Am. St. Rep. 721,) the action was for negligently causing the death of the plaintiff's intestate, who was killed while attempting to rescue a child on the track of the defendant company under circumstances not unlike those surrounding the parties in this case. After stating that the conduct of the deceased would have been grossly negligent but for the effort to save the child, it is said: "But the evidence further showed that there was a small child upon the track, who, if not rescued, must have been inevitably crushed by the rapidly approaching train. This the deceased saw, and he owed a duty of important obligation to this child to rescue it from its extreme peril, if he could do so without incurring great danger to himself. Negligence implies some act of commission or omission wrongful in itself. Under the circumstances in which

the deceased was placed it was not wrongful in him to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety. It was his duty to exercise his judgment as to whether he could probably save the child without serious injury to himself. If, from the appearances, he believed that he could, it was not negligence to make an attempt so to do, although believing that possibly he might fail and receive an injury himself. He had no time for deliberation. He must act instantly, if at all, as a moment's delay would have been fatal to the child. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury is negligence which will preclude a recovery for an injury so received; but when the exposure is for the purpose of saving life it is not wrongful, and therefore not negligent, unless such as to be regarded either rash or reckless. The jury were warranted in finding deceased free from negligence, under the rule as above stated."

This is a clear statement of the law and the reason upon which the rule rests, and is abundantly sustained by the authorities. Whether in this case the plaintiff acted with reasonable prudence, or with recklessness, in attempting to save her child, was a question for the jury under all the facts and circumstances in evidence.

There is, however, an exception to the general rule above stated, which is, that if the person attempted to be rescued was placed in the position of danger through the fault of the person injured, the danger will not excuse the attempt to save him, and counsel for appellant insist that this case falls within that exception. Reliance in support of this position is especially placed up-

on the case of *Atlanta and Charlotte Air Line Railway Co. v. Leach*, 91 Ga. 419. In that case the injured party had wrongfully taken a child upon a trestle-work of a railroad, and was killed while attempting to save it from injury by an approaching train. The court there said: "In making the efforts, however, he was neglecting his own safety, and thus violating his duty to the company. He had the choice of two fearful alternatives, and he undertook, and it was creditable to him, to perform the duty he owed the child, but it must not be overlooked that he was himself responsible for the situation that forced this awful alternative upon him." There, it will be seen, there was upon the part of the deceased something more than mere passive negligence,—mere omission of duty,—but an affirmative act in taking the child into a place of imminent danger. Here, the most that can be said is that the mother was negligent in failing to give proper attention to the child.

It is undoubtedly the duty of parents in cities to use reasonable care to guard their children against the known danger to them when allowed to go unattended upon the public streets; but the standard of such care is not capable of being defined by the law, and each case must depend upon its own facts and circumstances. That it is not negligence *per se* to permit infants to be upon the streets of a city was held by this court in *City of Chicago v. Major*, 18 Ill. 349.

In *Fox v. Oakland Consolidated Street Railway Co.* 118 Cal 55, (62 Am. St. Rep. 216,) the action was against the street railway company for negligently running over and killing a child four and a half years of age. The child had been permitted to play in the street in front of the family residence in the city of Oakland, and occasionally went upon the street on which it was killed, about one hundred feet away from the dwelling, though it had been cautioned by its mother not to do so. It had been absent from home some fifteen minutes at the time of the accident. The

evidence was to the effect that he was an ordinarily obedient child; that his parents were laboring people and had only one other child, a thirteen year old daughter, who was attending school. To the contention on behalf of defendant below that the evidence established negligence *per se*, the court say: "If the term 'negligence' signified an absolute quantity or thing, to be measured in all cases in accordance with some precise standard, much of the difficulty which besets courts in the solution of this class of cases would be at once dissipated. But, unfortunately, it does not. Negligence is not absolute, but is a thing which is always relative to the particular circumstances of which it is sought to be predicated. For this reason it is very rare that a set of circumstances is presented which enables a court to say, as a matter of law, that negligence has been shown. As a very general rule it is a question of fact for the jury—an inference to be deduced from the circumstances; and it is only where the deduction to be drawn is inevitably that of negligence that the court is authorized to withdraw the question from the jury. The fact that the evidence may be without conflict is not controlling, nor even necessarily material. Conceded facts may as readily afford a difference of opinion as to the inferences and conclusions to be drawn therefrom as those which rest upon conflicting evidence, and if there be room for such difference the question must be left to the jury. (Beach on Contributory Neg. sec. 163; *Schierhold v. North Beach Railroad Co.* 40 Cal. 447; *Van Praag v. Gale*, 107 Cal. 438.) Within these principles the evidence of this case cannot be said to establish negligence *per se*. Parents are chargeable with the exercise of ordinary care in the protection of their minor children, and whether the conduct of the mother, for which plaintiff is to be held responsible, in permitting the deceased child to be out of her sight for a period of from fifteen to twenty minutes without satisfying herself of its whereabouts, was, under all the circumstances, a



want of ordinary care, was, we think, a fairly debatable question." *Schierhold v. North Beach Railroad Co. supra*, *Meeks v. Southern Pacific Railroad Co.* 56 Cal. 513, *Birkett v. Knickerbocker Ice Co.* 110 N. Y. 504, *Slattery v. O'Connell*, 153 Mass. 94, and *Creed v. Kendall*, 156 id. 291, are to the same effect.

It is said that in the Massachusetts cases, *supra*, facts were shown such as pecuniary circumstances, condition of health, etc., of the parents, whereas here nothing of the kind appears. It is true that in the *Major case, supra*, and perhaps the decisions of other courts on the question of parental care in keeping their children off the streets of cities, allusion is made to the fact that the parents of many children in large cities are laboring people and in limited circumstances, unable to employ nurses and servants to attend their children. Such facts do not, however, determine the right of the parent to suffer children to go upon the street, but the question decided in such cases is, that it is not negligence *per se* for them to do so. It certainly cannot be said, as a matter of law, that it is negligence *per se* for a wealthy or healthy parent to permit his infant child to be upon a public street where he knows it is exposed to danger, but that it is not such negligence if the parent be sick or poor, depending upon his daily labor for the support of himself and family,—and the weight of authority, we think, is clearly against any such discrimination. *Fox v. Oakland Consolidated Street Railway Co. supra*, and cases there cited.

If, in this case, the plaintiff had simply permitted her child to be upon this street unattended, and it had been injured or killed through the negligence of the defendant company, and she had brought an action for that injury, it is clear that under the authorities the question whether she was guilty of such contributory negligence as would defeat her action would have been a question for the jury. Can it be said, as a matter of law, that she exercised a less degree of care in this case? It is true that nothing was shown tending to prove her inability to

keep constant watch over her child or to employ others to do so; but did she so far fail to exercise reasonable care in restraining it from being exposed to danger that a court can say, as a matter of law, that she was guilty of contributory negligence? As before stated, her own evidence shows that she held the child by the hand, and that it slipped away from her only for a moment and that she immediately pursued it. Can the court say, as a matter of law, that she was bound to hold the child in her arms, or hold it by the hand, or keep her eyes on it, constantly while upon the street?

"When facts are unchallenged, and are such that reasonable minds could draw no other inference or conclusion from them than that the plaintiff was or was not at fault, then it is the province of the court to determine the question of contributory negligence as one of law, and when the case is all against the plaintiff there may properly be a non-suit; but in the language of Mr. Field, 'to justify a non-suit on the ground of contributory negligence the evidence against the plaintiff should be so clear as to leave no room for doubt, and all material facts must be conceded or established beyond controversy.'" Beach on Contributory Neg. secs. 447, 448, 449; *Chicago and Eastern Illinois Railroad Co. v. O'Connor*, 119 Ill. 586; *Hoehn v. Chicago, Peoria and St. Louis Railway Co.* 152 id. 223; *Wabash Railway Co. v. Brown*, id. 484; *Chicago and Western Indiana Railroad Co. v. Ptacek*, 171 id. 9.

It seems to us clear beyond controversy that all reasonable persons would not say, under the facts showing the conduct of this mother prior to the time that her child got upon the street car track, that she was guilty of negligence,—that very many would consider her reasonably careful. The question was therefore one of fact and proper to be submitted to a jury. She had a right reasonably to presume that if the child for the time escaped from her and became exposed to danger others would not negligently injure it, and, seeing it suddenly

so exposed, she had the right, and it was her duty, not only to the child but to the defendant itself, to make all reasonable efforts to rescue it from that danger.

On the whole record we find no reversible error, and the judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

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MICHAEL BAUERLE

v.

ANDREW LONG *et al.* Exrs.

*Opinion filed October 19, 1900.*

187	475
92a	598
92a	595

**EXECUTORS AND ADMINISTRATORS**—*when executor is not liable in his representative capacity for breach of contract.* An executor authorized by the will to sell real estate has no implied power to bind the estate by warranty deed, but only to convey whatever title the testator had, and hence no action can be maintained against him in his representative capacity for breach of an executory contract to make a warranty deed.

*Bauerle v. Long*, 88 Ill. App. 177, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. SAMUEL C. STOUGH, Judge, presiding.

J. HENRY KRAFT, for appellant.

DOW, WALKER & MARSH, for appellees.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

Plaintiff, appellant here, by his amended declaration in case, averred that appellees, as executors of the last will of John H. Schoenberger, deceased, by their duly authorized agent, one O. W. Ballard, agreed to sell and convey to him certain real estate situated in Cook county,

(describing it); that under said last will said executors were authorized, ordered and directed to sell and dispose of said real estate upon such terms as to them should seem most advantageous, at either public or private sale. The declaration then sets out *in hæc verba* a receipt signed by said Ballard, as follows:

"CHICAGO, August 14, 1890.

"Received of Michael Bauerle \$5000, payment on a certain contract dated August 14, 1890, for the purchase of the south half of the south-east quarter of section 17—39—13, bargained to him according to the terms of said contract, a copy of which has this day been sent forward for signatures, and I agree that said sale shall be consummated at the price therein mentioned.

O. W. BALLARD."

The declaration also sets out in full the articles of agreement referred to in the receipt, purporting to be a contract of even date with the receipt, between "the estate of John H. Schoenberger, deceased, party of the first part, and Michael Bauerle," providing that upon the payment of \$240,000 by Bauerle in certain installments, and of taxes and assessments, "the said party of the first part hereby covenants and agrees to convey and assure to the said party of the second part in fee simple, clear of all encumbrances whatever, by a good and sufficient warranty deed," the property therein described. The declaration further avers that the defendants "wrongfully and in fraud of the rights of plaintiff failed and refused" to sign these articles, but avers a confirmation and ratification thereof, and of the authority of their agent, Ballard, to make the sale, by the filing of their bill in equity seeking a specific performance of the articles of agreement, as signed by Bauerle only; avers a hearing on said bill and a dismissal thereof for want of equity by the circuit court and an affirmance of that decree by this court. (See *Pennsylvania Co. for Insurance on Lives v. Bauerle*, 143 Ill. 459, and *Bauerle v. Long*, 165 id. 340, from the opinions in which cases the additional facts will appear.) Plaintiff averred also that he actually paid the \$5000 called

for by said receipt, and has been ready and willing to make all payments required to be made; "that it then and there became the duty of said defendants to furnish to the plaintiff herein a sufficient warranty deed and abstract showing good title to the premises described, as is by said contract required, and to perform all the covenants on their part to be performed." The breach charged is the failure of defendants to furnish a warranty deed, abstract, etc., and the damages claimed are \$100,000, consisting of the \$5000 earnest money paid and the balance on account of the loss in not obtaining the property, which property plaintiff avers to be worth \$340,000. To this declaration a demurrer was sustained. Plaintiff abided his declaration, and brings the record to this court on appeal from a judgment of the Appellate Court affirming the judgment of the superior court.

The executors derived no power under the will of their testator to bind his estate by a warranty deed. The law gave them no such right and authority as executors. No action can therefore be maintained against them in their representative capacity for a breach of warranty or for a failure to execute a warranty deed, when they have no authority vested in them to make the same.

In *Vincent v. Morrison*, Breese, 227, the administrators undertook to covenant in a deed of land sold to pay debts of their intestate, that the land was free from encumbrances, and the court say (p. 231): "In relation to covenants the general rule is, that an administrator has no power to charge the effects of the intestate by any contract originating with himself; and it seems from the current of decisions that his contracts in the course of his administration, or for the debts of his intestate, render him liable *de bonis propriis*,"—citing *Sumner v. Williams*, 8 Mass. 262.

In *Mason v. Caldwell*, 5 Gilm. 196, the court say (p. 207): "If an administrator or guardian, in his representative capacity, makes a contract or covenant which he has no

right to make, and which is not binding upon the estate or ward, he is bound personally to make it good."

"The rule is well settled that an executory contract of an executor or administrator, if made on a new and independent consideration moving between the promisee and the promisor, is his personal contract, and does not, in absence of authority given by statute or by will of the decedent, bind the estate." 11 Am. & Eng. Ency. of Law, (2d ed.) p. 932, citing numerous cases.

In *Austin v. Munro*, 47 N. Y. 360, it is said: "The rule must be regarded as well settled, that the contracts of executors, although made in the interest and for the benefit of the estate they represent, if made upon a new and independent consideration, as for services rendered, goods or property sold or delivered, or other consideration moving between the promisee and the executors as promisors, are the personal contracts of the executors and do not bind the estate; notwithstanding the services rendered or goods and property furnished, or other consideration moving from the promisee, are such that the executors could properly have paid for the same from the assets and been allowed for the expenditure in the settlement of their accounts. The principle is, that an executor may disburse and use the funds of the estate for purposes authorized by law, but may not bind the estate by an executory contract, and thus create a liability not founded upon a contract or obligation of the testator. (*Ferrin v. Myrick*, 41 N. Y. 315; *Reynolds v. Reynolds*, 3 Wend. 244; *Demott v. Field*, 7 Cow. 58; *Meyer v. Cole*, 12 Johns. 349.) The rule is too well established in this State to be questioned or disregarded, and any departure from it would be mischievous."

The rule is well understood and generally accepted, that executors are not chargeable, as such, on their executory contracts. Their acts are subject to the control of the court appointing them,—and this, notwithstanding they act under powers conferred by will. Here the

will gives them no power to warrant their testator's title, which was all, as executors, they could convey, and a purchaser would only take whatever title the testator had.

Appellant insists that the reasons assigned by courts authorizing suits against a receiver, as such, judgment to be paid in course of administration, apply with equal cogency to cases against executors and administrators, and our attention is called to the language employed by this court in *McNulta v. Lockridge*, 137 Ill. 270. That was a suit for damages brought against McNulta, as receiver of the Wabash Railway Company. There, through the legal management of the property entrusted to his care, but through the negligent or wrongful acts of the servants employed in the court's operation of the road, without fault on the part of the receiver, a person was killed, and the court hold a suit and judgment for consequent damages is in the nature of a proceeding *in rem*. There the injury resulted from the legal management of the property by the receiver, as such, and not from his illegal or wrongful acts. While in one sense the negligence of the servant is his own under the rule of *respondeat superior*, yet in another sense the fault is not his own, and the wrong is chargeable to the thing or property itself which the court is managing, and arises not from the receiver's act, but from the act of the court through the necessity of conditions requiring judicial interference. The injury resulted in the doing of the very thing which the receiver was directed to do,—to properly manage and operate the property committed to his charge. Here the contract for the alleged breach of which a recovery is sought against the estate, was without the authority of the executors to make,—a fact equally well known to both parties.

The superior court did not err in sustaining a demurrer to plaintiff's declaration, and the judgment of the Appellate Court for the First District is affirmed.

*Judgment affirmed.*

## JOHN MACKIN

v.

DWIGHT HAVEN, Trustee, *et al.**Opinion filed October 19, 1909.*

187	480
a189	1556
98a	4 28

187	480
e107a	1 88
e108a	160

187	480
207	*278

1. **RIGHTS AND REMEDIES**—*when heirs are liable for rent under ancestor's lease.* Heirs of the lessee in a party-wall lease which is under seal and which contains a clause binding the heirs, executors, administrators and assigns of each party, are liable as at common law for rent accruing under the lease, and can only escape such liability by pleading and proving *riens per descent*.

2. **SAME**—*effect of Statute of Frauds upon common law remedy against heirs.* Sections 11 to 14, inclusive, of the Statute of Frauds and Perjuries, are merely cumulative to the common law remedy against heirs, and furnish additional remedies to all creditors of the ancestor, including specialty creditors.

3. **SAME**—*when not necessary to file claim against estate.* One electing to pursue his common law remedy to recover rent against the heirs of the lessee, who has bound them by the terms of the lease, need not file a claim against the estate of the deceased lessee nor attempt to collect it out of his personal estate.

4. **SAME**—*section 67 of Administration act does not apply to contingent claims.* Section 67 of the Administration act, which permits the proving of unmatured claims against an estate, does not apply if the obligation is merely a contingent one.

5. **LEASES**—*party-wall lease creates cross-easements running with the land.* A party-wall lease which makes its covenants and conditions binding upon the heirs, executors, administrators and assigns of each party, will, when delivered and acted upon, create cross-easements, which, with the covenants and agreements, will bind all persons succeeding to the estate to which they are appurtenant.

6. **SAME**—*transfer of leasehold interest carries the burden as well as the benefit.* The right of support given in a party-wall lease constitutes an easement beneficial to the estate of the lessee while the covenant to pay the rent reserved constitutes the burden, and a transferee who accepts the benefit must also assume the burden.

7. **SAME**—*payment of rent under a party-wall lease is an attornment.* Payment of the rent reserved in a party-wall lease by an heir in possession who received the leasehold interest as part of his share of the lessee's estate, is such a recognition of the landlord's right as to be, in law, an attornment.

8. **SAME**—*tenant in possession is estopped to deny lessor's title.* One who enters into possession of a building under the lessee in a party



wall lease relating thereto is estopped to deny the lessor's title by claiming that the wall is not upon such lessor's land.

9. *SAME*—*tender of lease to lessor does not give tenant a right to deny lessor's title.* A tenant does not, by tendering the lease to the lessor without surrendering possession of the premises, put himself in a position to dispute the lessor's title.

10. *PROPOSITIONS OF LAW*—*court may refuse propositions not based on the evidence.* In trying a case without a jury the court may properly refuse a proposition of law if the evidence fails to establish the facts which it assumes and upon which it is predicated.

11. *SAME*—*proposition calling for opinion on question of fact is properly refused.* A proposition which calls for the opinion of the court upon a question of fact alone, is properly refused.

*Mackin v. Haven*, 88 Ill. App. 434, affirmed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the County Court of Cook county; the Hon. M. W. THOMPSON, Judge, presiding.

This is a suit, begun originally before a justice of the peace on March 25, 1897, by the appellees, Dwight Haven, trustee under the last will of Samuel Rush Haven, deceased, and Jane S. Haven against the appellant, John Mackin, to recover the amount due at that date under a lease and party-wall agreement, executed on August 1, 1872, between said Samuel R. Haven, as party of the first part, and Thomas Mackin, now deceased, (father of the appellant,) as party of the second part. The justice of the peace found in favor of the appellant, and appellees prosecuted an appeal from his judgment to the county court of Cook county, where a trial was had before the court without a jury, the jury having been waived by agreement. The county court rendered a judgment against appellant, and in favor of appellees, for \$167.50 and costs, being for the installment of rent (\$150.00,) which fell due August 1, 1896, and legal interest thereon from that date to the date of the trial in the county court. From the judgment of the county court an appeal was prosecuted to the Appellate Court, where the judgment

of the county court was affirmed. The present appeal is prosecuted from the judgment of affirmance, so entered by the Appellate Court. The Appellate Court has granted a certificate of importance.

Samuel Rush Haven died testate on May 4, 1890, and on June 13, 1890, his will was admitted to probate in the probate court of Cook county. By proceedings had in said probate court, and in a partition suit in the superior court of Cook county, to which Thomas Mackin was a party defendant, the title to lot 9, hereinafter named, passed to appellees; and they thereby became vested with all the right, title, interest and claim of Samuel Rush Haven under the lease hereinafter mentioned. It is conceded by the appellant that, if any recovery at all can be had in this suit, the suit is properly brought by the present appellees, as plaintiffs.

On August 1, 1872, Samuel Rush Haven was the owner in fee of lot 9, in block 113, school section addition to Chicago, known as 326 and 328 South Clark street, situated on the west side of that street. Thomas Mackin, the father of appellant, was at that date in possession of the north half of lot 10 in said block, known as 330 South Clark street, and lying south of lot 9, under a lease from the board of education of the city of Chicago. Thomas Mackin held lot 10 under the last named lease up to the date of his death on November 16, 1893. His leasehold interest in lot 10, being for a period of not less than thirty years, was included in the inventory filed in his estate. Thomas Mackin, desiring to use the south wall of the building on Haven's property as the north wall of the building he proposed to erect on the north half of lot 10, entered into the lease or party-wall agreement with Samuel R. Haven, which was executed by them as above set forth on August 1, 1872.

By the terms of the lease or party-wall agreement, dated August 1, 1872, Haven, as party of the first part thereof, leased to Mackin, as party of the second part

thereof "so much of lot No. 9, etc., \* \* \* (being about eleven inches front and rear and extending of that width the full depth of said lot) as lies south of a line through the center of the brick wall which now stands upon said lot 9, and along or near the south line or boundary thereof, together with the right and privilege hereby also granted to said Mackin, his executors, administrators and assigns, to use the said wall as a party wall in the erection, maintenance and support of any building or buildings to be erected during the continuance of this lease by said Mackin, his executors, administrators or assigns, upon the premises next adjoining said lot 9 upon the south, and described as the north half of lot 10, in said block, with the further right to build a continuation of said Haven's south wall to the rear of said lot 9 at his, Mackin's, own expense and for his own use and benefit, but which may be used by said Haven as a party wall by crediting said Mackin as hereinafter specified; said wall to be constructed of brick. To have and to hold the above described premises with the appurtenances, unto the party of the second part, from the first day of August in the year of our Lord, 1872, for and during and until the first day of August, A. D. 1902, if the said wall, one-half of which is upon the premises hereby demised, shall stand so long. This lease to be immediately determined by a total destruction of said wall. And the party of the second part, in consideration of the leasing of the premises aforesaid, does covenant and agree with the party of the first part, to pay him as rent for said premises, at the office of said Haven in Chicago, the sum of \$150.00 in advance on the first day of August of each and every year during the continuance of this lease (beginning with this first day of August, A. D. 1872) as yearly rent therefor." The lease or agreement then specifies the deduction or deductions, which are to be made in the rent by Haven, in case he shall make connections with the wall, which may be erected by Mackin. By the terms

of the agreement, Mackin is to pay one-half of the expense of repairing and keeping the party wall in order, and Haven is to pay the other half. By the terms of the agreement Mackin agrees, that he will pay all water rates, taxes and assessments against the demised premises, and, if he shall neglect to do so, Haven has the right to pay the same and add the amount of such payment to the rent, and to collect the same by distress or otherwise, as is provided for the collection of the other rents to grow due thereon. By the lease or agreement it is agreed by Mackin for himself, his heirs, executors, administrators and assigns, that the rent and each installment thereof shall be and is declared to be a valid and first lien upon any and all buildings and improvements on the premises, or that may be erected thereon, by Mackin, his heirs, executors, administrators, or assigns. It is also provided therein that, whenever any installment of rent remains unpaid after it becomes due, Haven, his heirs, executors, administrators, etc., may sell at public auction to the highest bidder for cash, after having given a certain notice, the buildings and improvements on said premises, and the interest acquired therein under the lease by Mackin, and may make to the purchaser a bill of sale or deed of the same, and out of the proceeds, after paying expenses, retain the rent due on the lease. Mackin covenants that at the expiration of the lease he will yield up the demised premises to Haven in as good condition as when the same were entered, loss by fire, etc., excepted. The lease or agreement also contains provisions that, if the rent shall be unpaid, or if default shall be made in any of the covenants of the lease to be kept by Mackin, his executors, administrators or assigns, Haven, or his heirs, executors, administrators, etc., may declare the term ended, and enter into the demised premises, and remove Mackin, and re-possess said premises, etc. It is recited in the agreement, that Mackin means and intends thereby to give Haven, his heirs, ex-

ecutors, administrators, etc., a valid and first lien upon all the goods, chattels or other property belonging to Mackin as security to the payment of the rent, and, if at any time the term is ended at the election of Haven or his heirs, etc., Mackin covenants and agrees to surrender and deliver up the premises peaceably to Haven, his heirs, executors, administrators, etc. It is also provided that, if Mackin his executors, administrators or assigns shall remain in possession after notice of default, or after the end of the lease, he is to be deemed guilty of a forcible detainer under the statute, etc.

This lease or agreement, which is signed by Haven and Mackin under their hands and seals, contains the following provision: "It is further understood and agreed, that all the conditions and covenants contained in this lease shall be binding upon the heirs, executors, administrators and assigns of the parties to these presents, respectively."

Thomas Mackin thereafter took possession of the demised premises, and used the south half of the wall as a party wall, the same forming the north wall of the building erected by him on the north half of lot 10. Thomas Mackin continued to use the same until the date of his death. Thereafter appellant, the son of Thomas Mackin, continued to use the same. The building upon the north half of lot 10, and the leasehold interest therein owned by Thomas Mackin, passed to appellant as one of the heirs-at-law of Thomas Mackin.

Thomas Mackin died November 16, 1893, leaving his widow, Martha Mackin, and two children surviving him, as his only heirs-at-law, to-wit: his son, the appellant herein, John Mackin, and his daughter, Alice Philbin, the wife of John J. Philbin. Letters of administration were issued upon his estate to John Mackin, appellant, and J. J. Philbin, Jr., on January 30, 1894. Although the two years for the settlement of the estate expired on January 30, 1896, the estate was not finally declared set-

tled until November 13, 1896. August 1, 1895, there was a settlement and division of the estate between the heirs-at-law of Thomas Mackin, by the terms of which appellant received real estate conceded to be worth over \$100,000.00. Included in the property received by appellant was the leasehold interest in the north half of lot 10. Appellant thereupon went into possession of the north half of lot 10, and has ever since collected the rents therefrom. The rent under the lease or party-wall agreement of August 1, 1872, which fell due on August 1, 1894, and August 1, 1895, was paid, the latter by the individual check of appellant. Appellant refused to pay the rent, which fell due August 1, 1896, for the recovery of which the present suit is brought.

Thomas Mackin left personal estate exceeding in value \$300,000.00. A complete inventory of all his estate was filed by the administrators in the probate court of Cook county within two years after the issue of letters of administration. No claim for rent under the present lease or party-wall agreement was filed against the estate.

At the close of plaintiffs' case upon the trial below appellant moved for a finding in behalf of the defendant, but this was overruled and exception was taken. When all the proof was in, the same motion was again made, and overruled, and exception was taken.

Appellant submitted to the court, to be held as law in the decision of the case, eight propositions of law. Of these the second and third were marked "held" by the court, but all the others were refused. To this refusal exception was duly taken.

During the trial appellant offered to prove, that the wall in question was partly upon his own land, and not altogether upon the land owned or held by appellees. Upon objection being made, this testimony was not admitted, and an exception was taken to this ruling. Appellant offered to show by a surveyor, that a portion of

the wall in question was in fact on lot 10. An objection to this testimony was sustained, and appellant excepted.

ARTHUR HUMPHREY, for appellant:

This action was originally commenced before a justice of the peace, and hence there are no written pleadings in the cause, and all defenses, including the Statute of Frauds, may be regarded as having been pleaded. *Wilson v. Bevans*, 58 Ill. 232.

The rent sued for was a proper claim against the estate of Thomas Mackin, deceased, said estate being amply solvent in personal property alone, and no claim having been filed against said estate for the rent in question it is now barred and no recovery therefor can be sustained. Rev. Stat. chap. 3, secs. 67, 70; *Hales v. Holland*, 92 Ill. 494; *Russell v. Hubbard*, 59 id. 335; *Sloo v. Pool*, 15 id. 47; *Shephard v. Rhodes*, 60 id. 301; *Roberts' Admr. v. Flatt*, 142 id. 485.

An heir is not liable for the debts of his ancestor when such ancestor leaves personal estate sufficient to discharge all just demands against his estate. *Hoffman v. Wilding*, 85 Ill. 453; *People v. Brooks*, 123 id. 246; *Laughlin v. Heer*, 89 id. 119; *Guy v. Gericks*, 85 id. 428.

Where an action is brought against the heirs or devisees under our statute, the facts authorizing it must be distinctly set forth in the declaration. (*Ryan v. Jones*, 15 Ill. 1.) In this case the declaration contains merely the common counts. No recovery could therefore be had against appellee, as devisee. *McLean v. McBean*, 74 Ill. 134.

The personal estate must be exhausted before the real estate taken by the heirs can be touched. *Guy v. Gericks*, 85 Ill. 428.

HILL, HAVEN & HILL, (WILLIAM GARNETT, Jr., of counsel,) for appellees:

Under the common law, where, by a specialty, an ancestor expressly bound the heir, and thereafter the ancestor died leaving real estate which descended to the heir,

the heir was liable, under such specialty, to the extent of the real estate inherited and not disposed of before suit brought. *Ryan v. Jones*, 15 Ill. 1; *Hoffman v. Wilding*, 85 id. 455; *People v. Brooks*, 123 id. 248; *Payson v. Haddock*, 8 Biss. 293; *Taylor on Landlord and Tenant*, sec. 462.

The remedies provided by sections 11 to 14 of chapter 59, relating to frauds and perjuries, are simply cumulative to the common law remedy and do not supersede it. They have the effect of furnishing not only additional remedies to the specialty creditor, but also to all creditors of the deceased. *Ryan v. Jones*, 15 Ill. 1; *Crocker v. Smith*, 10 Ill. App. 376; *Hoffman v. Wilding*, 85 Ill. 453.

It is a general rule in the construction of statutes that they are not presumed to alter the common law farther than they expressly declare; and where a statute gives a new remedy, and contains no negative, express or implied, of the old remedy, the new one provided by it is cumulative, and the party may elect between the two. *Smith v. Laatsch*, 114 Ill. 279; *Bank v. McCrear*, 106 id. 289.

The covenant in the lease on behalf of the heirs and assigns is joint, and by statute is made joint and several. *Rev. Stat. chap. 76, sec. 3.*

The covenant in a lease or deed to pay rent is one that runs with the land. *Webster v. Nichols*, 104 Ill. 160; *Roche v. Ullman*, id. 11; *Sexton v. Chicago*, 129 id. 334; *Railroad Co. v. Railroad Co.* 174 id. 453; *Consolidated Coal Co. v. Piers*, 39 Ill. App. 456.

A covenant will run with the land when it tends directly or necessarily to enhance its value or render it more beneficial or convenient to the owner or occupant. *Gibson v. Holden*, 115 Ill. 205; *Railroad Co. v. Railroad Co.* 174 id. 453.

A conveyance of an estate to which an easement has become appurtenant carries with it the easement, whether mentioned in the deed or not. *Roche v. Ullman*, 104 Ill. 11; *Tinker v. Forbes*, 136 id. 242; *Gebhardt v. Reeves*, 75 id. 301; *Shelby v. Railroad Co.* 143 id. 385.



A tenant in possession cannot dispute his landlord's title. He is estopped from so doing. *Sexton v. Carley*, 147 Ill. 272; *Heisen v. Heisen*, 145 id. 665.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

*First*—The propositions of law numbered 4 and 5, asked by the appellant upon the trial below and refused by the trial court, announce that the appellees, plaintiffs below, having failed to file the claim sued on in this case against the estate of Thomas Mackin, deceased, within two years from the granting of letters of administration on said estate, the claim was forever barred by section 70 of chapter 3 of the Revised Statutes of Illinois, unless the appellees should find other estate of Thomas Mackin, not inventoried or accounted for by the administrators of said estate.

The refusal of propositions numbered 4 and 5 raises the question, whether this suit is properly brought as to the time when it was brought, and as to the person against whom it is brought. Section 11 of chapter 59 of the Revised Statutes, entitled "Frauds and Perjuries," provides that any person, his heirs, etc., who may have any debts or demands against any person who shall die intestate, and leave real estate to his heirs, to descend according to the laws of this State, may have and maintain the same actions which lie against executors and administrators upon his bonds, specialties, contracts and agreements against the executors or administrators and the heirs, or against the executors or administrators and the devisees, or may join the executors or administrators, the heir or heirs, and the devisees of such obligor, and shall not be delayed for the nonage of any of the parties. (2 Starr & Curtis' Ann. Stat.—2d ed.—p. 2029). Section 12 of the same act provides that, when any lands shall descend to any heir, and the personal estate of the ances-

tor of such heir shall be insufficient to discharge the just demands against such ancestor, such heir shall be liable to the creditor of the ancestor to the full amount of the lands, or rents and profits out of the same, as may descend or be devised to the said heir, etc. (Ibid. p. 2030). Section 13 of said act provides that, when any suit is brought against any heir, he may plead *riens per descent* at the time of the commencement of the suit, and the plaintiff may reply that he had lands from his ancestor before the commencement of the suit, and if, upon issue joined, it be found for the plaintiff, the jury shall inquire of the value of the lands, etc., and thereupon judgment shall be given and execution awarded as aforesaid, etc. (Ibid. 2031).

Section 70 of chapter 3 of the Revised Statutes, entitled "Administration," provides that "all demands not exhibited within two years, as aforesaid, shall be forever barred, unless the creditors shall find other estate of the deceased, not inventoried or accounted for by the executor or administrator, in which case their claims shall be paid *pro rata* out of such subsequently discovered estate," etc. (1 Starr & Curtis' Ann. Stat.—2d ed.—p. 302). Section 67 of the same act provides that "any creditor, whose debt or claim against the estate is not due, may, nevertheless, present the same for allowance and settlement, and shall, thereupon, be considered as a creditor under this act, and shall receive a dividend of the said decedent's estate, after deducting a rebate of interest for what he shall receive on such debt, to be computed from the time of the allowance thereof to the time such debt would have become due, according to the tenor and effect of the contract." (Ibid. p. 300).

It is conceded that the claim of appellees for rent, which is sued upon in this case, was not presented against the estate of Thomas Mackin within two years after the issuance of letters of administration. The contention of appellant is, that it could have been presented within

the time stated, and, inasmuch as it was not so presented, that it has been barred, and cannot now be enforced. It is also claimed by counsel for appellant, that this suit could not be brought against the heirs of Thomas Mackin under the above quoted sections of chapter 59, because he left personal property sufficient to discharge all demands against his estate.

The contentions of appellant would have much force, if the remedy here sought to be enforced was under the statutes above named. But the lease or party-wall agreement of August 1, 1872, contained a provision, that all the conditions and covenants therein contained "shall be binding upon the heirs, executors, administrators and assigns of the parties to these presents, respectively." At common law the heir, as such, was not liable for the debts of the estate of his ancestor, but took the real estate free of any claims of general creditors. While this was so, yet, at common law, "the ancestor might, by a specialty, bind the heir to the payment of a debt by expressly so declaring in the deed, and the heir was then bound to the extent of assets descended,—that is, to the extent of the value of the real estate coming from the ancestor to the heir by inheritance, for the word 'assets' in this connection always meant real estate." (*People v. Brooks*, 123 Ill. 246; *Taylor on Landlord and Tenant*, sec. 462; *Ryan v. Jones*, 15 Ill. 1; *Hoffman v. Wilding*, 85 id. 453). In *Ryan v. Jones*, *supra*, this court said: "Nor was an heir liable for the debts of the ancestor, in respect of lands descended, except in particular cases; such as debts due on specialties, in which the ancestor expressly bound the heir." The debt sued for in the case at bar is a debt due upon a specialty, to-wit: a lease or party-wall agreement under seal; and by the express terms of that specialty the heirs of Thomas Mackin are bound. The appellant, as heir of Thomas Mackin, received by descent real estate worth more than \$100,000.00. It would appear, therefore, to be clear that the heirs of Thomas Mackin are liable

for the rent sued for under this lease. The liability, thus imposed at common law, could only be escaped by pleading and proving *riens per descent*. As was said in *People v. Brooks*, *supra*: "If the heir had *bona fide* aliened the lands, which he had by descent, before an action was commenced against him, he might discharge himself by pleading that he had nothing by descent at the time of suing out the writ or filing the bill, and the obligee had no remedy at law." (See also *Crocker v. Smith*, 10 Ill. App. 376).

It is claimed, on the part of the appellant, that the common law remedy upon specialties, in which the ancestor expressly bound the heir, has been superseded by sections from 11 to 14 inclusive of our statute in regard to frauds and perjuries, being chapter 59 of the Revised Statutes. We are of the opinion, however, that the provisions of the statute thus referred to are merely cumulative to the common law remedy. They have the effect of furnishing additional remedies to all the creditors of the deceased, including specialty creditors.

In *Ryan v. Jones*, *supra*, section 6 of chapter 44 of the Revised Statutes of 1845, which was substantially the same as section 11 of chapter 59 of the present Revised Statutes, came under the consideration of this court, and it was there said: "It may be that a separate action will still lie against heirs in cases where they were suable at common law."

In *Hoffman v. Wilding*, *supra*, it was said by this court: "At the common law, an heir was not liable for the debts of the ancestor, in respect of lands descended, except in particular cases, such as debts due on specialties, in which the ancestor expressly bound the heir, and on judgments recovered against the ancestor and recognizances acknowledged by him; and where the heir aliened the lands before suit brought, the creditor was without remedy against him. \* \* \* As the debt, upon which this action was brought, does not fall within any of the speci-

fied cases in which, at common law, the heir would be liable, if the action can be maintained, it must be under the provisions of our statute."

In *Crocker v. Smith*, *supra*, the Appellate Court, speaking through the late Justice BAKER of this court, who was then a member of that court, said: "It is clear that appellee does not, by the averments in his declaration, bring himself within the provisions of the Statute of Frauds and Perjuries; and it is contended by appellant that the provisions of that statute worked a repeal of the common law remedy. We do not so understand the law. The remedies against heirs and devisees, furnished by the statute, are cumulative in their character, and afford not only a means for the collection of many debts and demands against deceased persons, for the collection of which no provision existed prior thereto, but also additional means for the collection of such debts as were already, at common law, a charge upon the heir. The purpose of the statute was not to change the common law remedy then existing for specialty creditors, when the ancestor had expressly bound the heir, but to give additional remedies, not only to them, but to all creditors of the deceased."

The view, that the statute has not superseded the old common rule and remedy, but has merely given additional and cumulative remedies, is sustained by the principles of statutory construction applicable in such cases. It is a general rule in the construction of statutes, that they are not to be presumed to alter the common law further than they expressly declare. Statutes are to be construed in reference to the principles of the common law; and it is not to be presumed, that the legislature intends to make any innovation upon the common law further than the case absolutely requires. (*Cadwallader v. Harris*, 76 Ill. 370; *Canadian Bank v. McCrear*, 106 id. 281; *Smith v. Laatsch*, 114 id. 271). A careful examination of the statutory provisions above referred to will show, that there

is nothing in them inconsistent with the continued existence of the common law remedy. They were intended merely to enlarge that remedy, and not to extinguish it. The statute does not expressly repeal the common law remedy, nor use such language as is inconsistent with its further existence. In *Chicago and Northwestern Railway Co. v. City of Chicago*, 148 Ill. 141, we said: "Bouvier, in his Law Dictionary, defines a cumulative remedy to be 'a remedy created by statute in addition to one which still remains in force.' \* \* \* Where a statute gives a new remedy and contains no negative, express or implied, of the old remedy, the new one provided by it is cumulative, and the party may elect between the two."

Counsel for appellant refers to a number of cases in support of the position, that the heir is not liable for the debts of his ancestor, where such ancestor leaves personal estate sufficient to discharge all just demands against his estate. (*People v. Brooks, supra*; *Guy v. Gericks*, 85 Ill. 428; *Hoffman v. Wilding, supra*; *Laughlin v. Heer*, 89 Ill. 119; *McLean v. McBean*, 74 id. 134). But a careful study of these cases will show that, under the facts therein stated, there were no common law remedies. In all the cases so cited, the proceedings were attempted to be had directly under the statute; and they were all cases, in which no remedy existed at the common law; and to justify a recovery it was necessary that the statute should be strictly complied with. There is nothing in these cases, so far as we can discover, which is inconsistent with the decision in *Crocker v. Smith, supra*. Inasmuch as the remedy here sought to be enforced is the common law remedy above referred to, it was not necessary to file the present claim against the estate of Thomas Mackin, or to make any attempt to collect it from his personal estate. In addition to this, the rent did not fall due until August 1, 1896, which was after the expiration of the two years allowed by law for the filing of claims in the county or probate court. In construing section 67 of chapter 3 in regard

to "Administration," as to the matters above quoted, we held in *Dunnigan v. Stevens*, 122 Ill. 396, that, if the obligation is an absolute undertaking, the claim can properly be proved against the estate in the probate court, even where the debt or claim is not due, but that, if the obligation is merely a contingent liability, then the claim is not properly provable in the probate court, and cannot be allowed. In *Stone v. Clark's Admr.* 40 Ill. 411, where the claim filed was based upon an indemnifying bond made by Clark, under which no damage resulted to Stone until more than two years after letters of administration were granted, it was held that Stone had no claim until he was damnified, and, as he was not liable on the notes and suffered no damage until after the lapse of the two years, his claim had not accrued within two years, and no suit could have been instituted within the two years. In the case at bar, the lease or party-wall agreement provides, that the premises are to be held by Thomas Mackin from August 1, 1872, until August 1, 1902, "if the said wall, one-half of which is upon the premises hereby demised, shall stand so long. This lease to be immediately determined by a total destruction of said wall." It thus appears that, until August 1, 1896, arrived, it could not be determined whether the wall might not be totally destroyed, or whether the lease might not be determined by failure to pay the rent, or what amount of rent would be due on that day; for, at any time, the representatives of the Haven estate might see fit to use some portion of the wall erected by Mackin under the terms of the lease, and, in such case, deduction would be required from the amount of the rent. The payment of rent under this lease was, therefore, dependent and conditioned upon the happening, or not happening, of certain events. If the claim had been presented to the probate court during the two years for the rent due August 1, 1896, it would have been a sufficient answer thereto to say, that the rent was only payable upon a contingency.

The only effect of the provision of the statute, embodied in section 70 of chapter 3, as above quoted, is to bar any action against the administrator or executor, unless the claim is filed within the two years, except as to assets not inventoried. (*Snydacker v. Swan Land and Cattle Co.* 154 Ill. 220).

Counsel for appellant objects to the form of the judgment entered by the court below, and says that the judgment was erroneous, because it was rendered against the appellant alone, whereas it is claimed that the judgment, if any, should have been against appellant and the other heir, payable out of the real estate descended. This question was not raised either in the county or Appellate Court, and it is, therefore, too late to consider it in this court. It is shown here that appellant, as heir of Thomas Mackin, received real estate by descent, exceeding in value \$100,000.00, and that he still holds all the property so acquired, and, at the time of the trial, was in receipt of the rents and profits thereof. He was clearly personally liable for the payment of this claim, arising out of a breach of his ancestor's covenant. That covenant bound him jointly with the other heirs of Thomas Mackin, and, by the statute of this State, "all joint obligations and covenants shall be taken and held to be joint and several obligations and covenants." (Rev. Stat. sec. 3, chap. 76, entitled "Joint Rights and Obligations;" 2 Starr & Cur. Ann. Stat.—2d ed.—p. 2321).

*Second*—The objection to the form of the judgment, however, disappears when it is remembered that the right to recover in this case is not merely predicated upon appellant's liability, as heir of the lessee, to whom real estate had descended, but, also, as assignee of the lease in possession thereunder, and enjoying the rents and profits thereby conferred. By the lease Thomas Mackin, his heirs and assigns, acquired the right to use the wall upon the demised premises, as a party wall, in the erection and support of any building to be erected, during



the existence of the lease, by Mackin. Mackin, his heirs and assigns, as owners of the leasehold interest in the north half of lot 10, were thus clothed with an easement in the property of Haven, which was appurtenant to their interest or estate in lot 10. The weight of authority establishes the position, that an agreement under hand and seal, containing covenants and stipulations such as are found in the present agreement, "will, when duly delivered and acted upon, as was done in this case, create cross-easements in the respective owners of the adjacent lots, with which the covenants and agreements will run, so as to bind all persons succeeding to the estates to which such easements are appurtenant." (*Roche v. Ullman*, 104 Ill. 11). The easement here was in favor of Mackin, his heirs and assigns, and, after its creation, any conveyance of the property, to which the easement was appurtenant, had the effect of conveying and transferring the easement also. In other words, any conveyance of Mackin's leasehold interest in the north half of lot 10 conveyed and transferred the easement in the south wall of Haven's property, even though that easement was not mentioned in the conveyance or assignment. (*Roche v. Ullman*, *supra*; *Tinker v. Forbes*, 136 Ill. 221; *Gebhardt v. Reeves*, 75 id. 301; *Shelby v. Chicago and Eastern Illinois Railroad Co.* 143 id. 385).

By operation of law, the leasehold interest of Mackin in lot 10, with all its appurtenances, passed to his representatives. (Taylor on Landlord and Tenant, sec. 427). By agreement a partition of the assets, including this leasehold interest, was made between appellant and his sister, Alice Philbin, the two heirs of Thomas Mackin, and this leasehold interest fell to appellant. The proof shows, that thereafter the administrators of Thomas Mackin's estate turned over, assigned and transferred to each of the heirs the property they had respectively agreed to take, and executed to them written assignments of their respective interests, and delivered possession

thereof to them respectively. Appellant admits in his testimony that, in the settlement of his father's estate, this leasehold interest was set over to him, and that he was in possession thereof, and received it from his father's estate in a division between himself and his sister as a part of his share of said estate, and was collecting the rents and profits therefrom; and that, on taking possession and assuming the ownership of the lease, together with the premises described in it, he kept on collecting the rents the same as before. This evidence establishes an assignment and transfer of this leasehold interest in the north half of lot 10 with its appurtenances to the appellant. The object of the agreement was to give the owner of the leasehold estate in the north half of lot 10 the right to use the south wall of the Haven building on lot 9 as the north wall of the building to be erected on lot 10, as a means of support. The right thereby acquired was clearly a benefit to Mackin, and his heirs and assigns, and to their leasehold estate. As such it constituted an easement appurtenant to that estate. Mackin, for himself and his heirs and assigns, covenanted to pay the rent reserved in the lease; and this was a burden which went with the privilege, and, when the benefit was accepted, the burden was assumed. A transfer of the leasehold estate carried with it not only the right, but also the burden. Both covenants necessarily run with the land. A covenant will run with the land, when it tends directly or necessarily to enhance its value, or render it more beneficial or convenient to the owner or occupant. (*Gibson v. Holden*, 115 Ill. 199; *Louisville and Nashville Railroad Co. v. Illinois Central Railroad Co.* 174 id. 448). The covenant in a lease or deed to pay rent is one that runs with the land. (*Webster v. Nichols*, 104 Ill. 160; *Sexton v. Chicago Storage Co.* 129 id. 318; *Roche v. Ullman*, *supra*; *Louisville and Nashville Railroad Co. v. Illinois Central Railroad Co.* *supra*). Under our statute "real estate" embraces "chattels real," and a lease for years of

land with the building thereon is a chattel real. (1 Starr & Cur. Stat.—2d ed.—p. 957; *Knapp v. Jones*, 143 Ill. 375).

In view of what has been said, we are of the opinion that the trial court committed no error in refusing to hold as law the seventh proposition, asked by the appellant; to the effect, that the lease from Haven to Thomas Mackin was never assigned to or owned by the appellant.

Some objection is urged by counsel for appellant to the admission by the court below of the evidence, relating to the assignment and ownership of the leasehold interest by appellant. This objection is without force. A report of the administrators, signed by the appellant himself, was introduced in evidence, which showed that such leasehold was, by written deed of conveyance, transferred by the administrators to the appellant. Although some objection was made at the trial to this proof, yet the objection urged was a general one, and not specific upon the ground that there existed better evidence of the fact. The evidence introduced was admissible as an admission by the appellant himself in regard to the assignment of the leasehold interest. As the objection was general, and not specific, to the proof offered it cannot be raised in this court. (Bradner on Evidence, secs. 9, 10, p. 498; *Sargeant v. Kellogg*, 5 Gilm. 273; *Swift v. Whitney*, 20 Ill. 144; *Espen v. Hinchliffe*, 131 id. 468; *Weber v. Mick*, 131 id. 520).

There is testimony in this case, which tends to establish an attornment upon the part of appellant to the present appellees. After the leasehold interest in the north half of lot 10 had been set off and assigned to the appellant in the partition between him and his sister, he sent a check for the rent due on August 1, 1895, to the appellee, Dwight Haven. This was his own personal check, and not signed by him as administrator. This payment was made by him after he had become the owner of the property, and while it no longer remained the property of the estate. It cannot be claimed, therefore, that

the payment was made in behalf of the estate, and not in behalf of appellant individually. This is a question of fact, however, which has been settled against the appellant by the judgments of the courts below. Payment of rent under a lease is such a recognition of the landlord's right, as to be, in law, an attornment. (*Fisher v. Deering*, 60 Ill. 114; *Voigt v. Resor*, 80 id. 331). There having, therefore, been an attornment by the appellant to appellees, the relation of landlord and tenant between appellees and appellant was thereby created; and appellant was personally liable for the rent, so sued for, to the appellees; and the suit was properly brought against him alone.

*Third*—By the first refused proposition of law, the appellant asked the court to hold, as matter of law, that, where one of two adjoining property owners builds upon his premises and, in building, extends his wall over onto the adjoining owner's property without said owner's license or permission, said adjoining property owner has the right to use the wall, and to connect his building with the same, so long as he does not cut into said wall beyond the line of his property. The proposition thus submitted may be correct as a mere rule of law, but it does not apply to the facts in this case, as there is no evidence in the record of the existence of any such facts as those, upon which the proposition is predicated. It was not error in the court below to refuse to hold it as law in the decision of the case. The court, trying a case without a jury, may properly refuse a proposition submitted, when the evidence fails to establish the state of facts it assumes, and upon which it is predicated. (*Windmiller v. Chapman*, 139 Ill. 163).

In line with this subject is the sixth proposition of law asked by the appellant, and which was refused by the court below. By the latter proposition the court was asked to hold, as matter of law, that the appellant is not estopped from denying that the said brick wall, men-

tioned in the lease, does not all stand upon said lot 9, and that appellant has the right to adduce competent testimony, if he can, tending to show that the said wall extends partially upon said lot 10. In the trial of the case the appellant also offered to show, by testimony which was excluded by the court, that the wall did extend partly upon said lot 10. The refusal of proposition 6, and the refusal to admit the offered testimony thus referred to, are assigned as errors by the appellant.

The only effect, which the excluded testimony could have had, would have been to question the title of the appellees, and, therefore, under the circumstances of this case, such testimony was clearly incompetent, and was properly excluded. No rule of law is better settled than that the tenant is estopped from denying the title of his landlord. "His possession is subservient to the title of the party under whom he entered. \* \* \* He cannot set up a better title in himself or a third person. \* \* \* The same principle applies to those acquiring the possession from the tenant. The relation of landlord and tenant attaches to all who succeed to the possession through or from the tenant. They acquire no greater right than the party from whom they received possession." (*Sexton v. Carley*, 147 Ill. 269). In the case at bar, as Thomas Mackin could not deny the title of the appellees to the demised premises, so the appellant, here holding under Thomas Mackin, cannot deny the same. Where the tenant enters under his landlord, he thereby acknowledges that the landlord is the owner, and the tenant is estopped from denying it. (*Doty v. Burdick*, 83 Ill. 473; *Hardin v. Forsythe*, 99 id. 312). Upon the trial of the case, the appellant tendered appellees the lease from S. R. Haven to Thomas Mackin, and offered to surrender the same, and claimed that he thereby put appellees in the same position which the original lessor occupied before the lease was made; and that, having done so, he then had a right to contest appellees' right to recover by showing that

the wall in question was located partly upon lot 10. We concur with the following views expressed upon this subject by the Appellate Court in their decision of this case: "It was immaterial whether Haven's claimed ownership of the demised premises at the time the lease was entered into, was rightful or not, or to whom the land belonged. Rightfully or wrongfully, Haven built the wall upon the land in question, and was in possession thereof. Thomas Mackin knew of and acquiesced in Haven's claim, whatever it was, and the fact of the existence of the wall and its possession by Haven, and entered into the lease and took possession under it, and such possession has continued by himself or his heirs through him, ever since.

\* \* \* (*Fleming v. Mills*, 182 Ill. 464). \* \* \* The offer made by appellant at the trial to surrender the paper lease was wholly unavailing to pave the way for the introduction of the offered, but rejected testimony. Such an act in no manner meets the requirements of law that, before a lessee can assail or question his lessor's title, under which he has entered, he must restore possession—must place his lessor in the same position he occupied before he parted with possession. \* \* \* Manifestly appellant's possession of the land and wall would not be surrendered by his bare surrender of the paper writing. There was no error in refusing to admit the offered testimony."

Appellant insists, however, that there is an exception to the general rule, that a tenant cannot deny the title of his landlord, and that the exception exists where the tenant has been induced by fraud, artifice or mistake to accept the lease. Certain authorities are referred to in support of this position. No proof of fraud or artifice was offered. The general rule upon this subject is that "when the fraud appears upon the face of a lease or deed, it may be invalidated in a court of law, but where the fraud consists in matter *dehors* the lease, it is voidable only in equity." (1 Wood on Landlord and Tenant,—

2d ed.—sec. 118). The fact, that the wall may have been partly upon lot 10, in which Thomas Mackin had a leasehold interest, would not show conclusively, that there had been a mutual mistake on the part of Samuel R. Haven and Thomas Mackin. As was said by the Supreme Court of Pennsylvania in *Thayer v. Society of United Brethren*, 20 Pa. St. 60: "The mere fact, that the tenant has a better title than his landlord, does not of itself raise the presumption that the lease was a fraud or accepted by mistake. The lease is not rendered void by proving title in the lessee. To make the law otherwise, would be to say that the tenant shall not set up title in himself when he has none, and that the lease shall be no evidence of the landlord's rights except when he can prove them without it."

We are of the opinion, that the court below committed no error in rejecting the offered testimony, nor in refusing to hold as law the propositions based upon the facts which, as it is claimed, would have been established by such testimony if introduced.

*Fourth*—It is assigned as error, that the court refused to hold as law one or two other propositions which were marked, "refused," by it. No error was committed in this regard. Upon a careful examination of these propositions they cannot be regarded otherwise than as requests to pass upon questions of fact. "The purpose of the statute is to enable a party to submit propositions with a view to obtaining the opinion of the court upon material and controlling principles of law only, and when the proposition calls for the opinion of the court upon a question of fact, it may properly be refused." (*Knowles v. Knowles*, 128 Ill. 110; *County of LaSalle v. Milligan*, 143 id. 321).

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

JOHN S. WOOLLACOTT

v.

THE CITY OF CHICAGO.

*Opinion filed October 19, 1900.*187 504  
208 406

1. EMINENT DOMAIN—*proviso to section 53 of article 9 of the City and Village act construed.* The proviso to section 53 of article 9 of the City and Village act, as amended in 1891, (Laws of 1891, p. 80,) providing that if, after two years from the date of a condemnation judgment, the court, upon motion of a party interested in the lands, finds that the city has taken possession without paying for the land, it may order the city to make payment within a short day, and in default thereof may award interest on the judgment and direct the issue of a writ of possession, does not authorize the allowance of interest unless the party is also entitled to possession.

2. DEDICATION—*statutory dedication passes title to city as effectively as a deed.* If a plat is executed, acknowledged and recorded in conformity with the provisions of the statute, it will operate as effectually as a deed to convey the title to the streets mentioned therein to the municipality.

3. SAME—*effect of making plat after city has condemned property.* A property owner is bound to know the law that a city may dismiss condemnation proceedings and vacate the judgments, and hence, if, after filing a petition to dismiss condemnation proceedings, he makes, acknowledges and records a plat showing the territory included in the condemnation judgment as a street and sells lots with reference to such plat, he is estopped to deny his intention to dedicate the land as a street after the city dismisses the condemnation proceeding,—and particularly where, after the recording of the plat and the dismissal of the proceeding, the city improves the street by paving and curbing it.

APPEAL from the Superior Court of Cook county; the Hon. JONAS HUTCHINSON, Judge, presiding.

This is a proceeding, stated by counsel to be under section 53, as amended in 1891, of article 9 of the City and Village act of 1872. The proceeding was begun by petition, filed on March 24, 1900, *nunc pro tunc* as of March 8, 1899, setting forth the condemnation and supplemental assessment proceedings hereinafter mentioned; and also



setting up the repealing of the ordinance of condemnation, and the vacation of the judgment of condemnation and of the judgment affirming the special assessment, and the dismissing of the petitions therein; and also setting up, that the city has assumed the control and use of the property condemned without paying compensation or damage therefor; and praying that a judgment be entered in accordance with the terms of the statute in such cases made and provided, awarding interest on the amount of said judgment from the date of taking possession of said property by the city, and further directing the issuance of a writ of possession for said property in favor of the petitioner.

On March 24, 1900, the court rendered a judgment, finding the issues for the respondent, the city of Chicago, and directing that the city recover of the appellant its costs and charges and have execution therefor, to which the appellant excepted. The present appeal is prosecuted from the judgment entered, or finding made, on March 24, 1900, as aforesaid.

The facts are substantially as follows: On November 15, 1886, the board of trustees of the town of Lake View passed an ordinance for opening and extending Lake View avenue from the south line of St. James place to the north line of Fullerton avenue, the avenue as opened and extended to be of the width of fifty feet, and the east line thereof to be the east line of the south-west quarter of section 28, township 40 north, range 14, east of the third principal meridian. On November 22, 1886, the town of Lake View filed in the superior court of Cook county its petition for the ascertainment of just compensation to be awarded to the owner or owners of property to be taken or damaged for the opening and extending of Lake View avenue as aforesaid. Among the property to be taken for said improvement, and described in said petition, was a strip of land fifty feet in width off the easterly line of lot 4 and off the south twenty-seven and one-half

feet in width of lot 3, all in assessor's division of lot 4 of Wrightwood, being a subdivision of said south-west quarter. At that time William C. Goudy was the owner of the strip of land fifty feet in width as above described. On November 2, 1887, the jury returned a verdict awarding to the owner of said strip \$5000.00. On January 7, 1888, judgment of condemnation for \$5000.00 was rendered upon the verdict. At that time William C. Goudy was the owner of the whole of said lot 4 and of the south twenty-seven and one-half feet of said lot 3. At that time, also, David Goodwillie, or his wife, Cecelia Goodwillie, was the owner of lot 2 in said assessor's division, and of said lot 3, except said strip of land twenty-seven and one-half feet in width off the southerly side of said lot 3.

A supplemental petition was filed under said section 53, praying that an assessment be made for the purpose of raising the amount necessary to pay the compensation and damages awarded for the property taken or damaged. In this supplemental proceeding the commissioners filed their assessment roll on January 21, 1888, and reported that lot 4 and the south twenty-seven and one-half feet of lot 3, except the east fifty feet thereof, was specially benefited in the sum of \$4628.75, being only \$371.25 less than the condemnation judgment. December 3, 1888, the said assessment roll and report were confirmed. Goodwillie and Goudy filed objections to the confirmation of the assessment, and took an appeal to this court from the judgment confirming the same. This appeal was finally disposed of on March 30, 1891, as may be seen by reference to the case of *Goodwillie v. City of Lake View*, 137 Ill. 51. After the filing of the original petition, the city of Lake View was substituted for the town of Lake View; and thereafter on June 29, 1889, the city of Lake View became annexed to the city of Chicago, and the city of Chicago entered its appearance in said proceeding, and assumed the direction and control of the proceedings of condemnation and supplemental assessment.

Said lots 2, 3 and 4 are long lots, running east and west and extending eastward from North Clark street to Lincoln park.

While the appeal from the judgment of confirmation was pending, Goudy and Goodwillie made a new subdivision of said lots 2, 3 and 4, known as Goudy & Goodwillie's subdivision of lots 2, 3 and 4 in assessor's division of lot 4, etc. By this subdivision a street, called Roslyn place, was made to run east and west and north of the property owned by Goudy; and said lot 4 and the south twenty-seven and one-half feet of said lot 3, so as afore-said owned by him, were subdivided into lots numbered from 18 to 33 inclusive. Of these lots, lots numbered from 18 to 30 inclusive ran north and south and fronted on Roslyn place, while lots numbered from 31 to 33 inclusive ran east and west and fronted on Clark street. In this subdivision lot 18 was the most easterly lot, and embraced the strip of land fifty feet wide mentioned in the condemnation judgment for \$5000.00.

On November 6, 1890, Goudy and wife deeded to appellant, John S. Woollacott, for an expressed consideration of \$75,000.00, said lots from 18 to 33 inclusive of Goudy & Goodwillie's subdivision above named. This deed contains the following recital: "The covenants in this deed shall not apply to the west fifty feet of said lots 31, 32 and 33, and also proceedings for condemnation of said lot 18, and a special assessment for opening and extending Lake View avenue."

On March 19, 1892, appellant and Goodwillie filed a petition in the original suit above described, under section 53 of article 9, of the City and Village act as amended in 1891, and therein described the proceedings for the opening and extending of Lake View avenue to the uniform width of fifty feet from the south line of St. James place to the north line of Fullerton avenue, as above set forth. Said petition so filed on March 19, 1892, stated

that, although more than two years had elapsed since the entry of judgment in said proceeding, yet that no part of the lands of Goudy and Goodwillie, or of any of them, had been taken or damaged for said improvement or otherwise, and that no part of the several sums awarded to be paid for said lands had been paid for them, or for any part thereof; and the petition prayed, that the court would enter an order that the city of Chicago should pay for said lands, so proposed and ordered to be taken, the said sums awarded therefor in said judgment within a short day to be fixed by the court, not later than twenty days from the date of entering of such order, and that, in default thereof, the proceedings be dismissed, so far as the same related to the lands of petitioners, appellant Woollacott, and said Goodwillie. The city of Chicago filed an answer to said petition of Woollacott and Goodwillie and stated in said answer, that the delay in the prosecution of the proceeding, if any, had been caused by Goudy and Goodwillie, who filed objections to the assessment, and took an appeal to the Supreme Court of the State, which was not finally disposed of until March 30, 1891, and that the order of the Supreme Court, affirming the judgment of confirmation, was not filed in the superior court until July 6, 1891. The answer averred, that the assessment roll had been certified by the clerk of the court to the city collector of Chicago, who was proceeding to collect the same. The answer also averred that the total amount of the judgment of the superior court was \$30,541.00, and that the total assessment against the property of Goudy and Goodwillie was \$11,638.00, and that the assessment roll would be fully collected in due process of law on or before the first day of November.

Some testimony was introduced in the present proceeding, tending to show that, on March 19, 1892, the same day on which the petition of appellant and Goodwillie was filed, the city of Chicago laid a water pipe in said strip of land fifty feet wide off the easterly line of

said lot 4 and the south twenty-seven and one-half feet in width of said lot 3, designated on Goudy & Goodwillie's subdivision as lot 18.

On October 29, 1892, while the petition of March 19, 1892, of appellant and Goodwillie was pending, the appellant Woollacott made and recorded a re-subdivision of lots 18, 19, 20 and the east thirty feet of lot 21 in Goudy & Goodwillie's subdivision of said lots 2, 3 and 4 and replatted the same, naming lot 18 upon said plat as "Lake View (boulevard) avenue," fifty feet wide; and the balance of said subdivision was platted as lots 1, 2, 3 and 4 running east and west and fronting on Lake View avenue as a street, and lots 5, 6 and 7 running north and south and fronting north on Roslyn place as a street, a private alley being designated upon the plat as running north and south between lot 5 and the rear or west ends of lots 1, 2, 3 and 4.

The answer of the appellee, the city of Chicago, to the present petition filed by appellant contains the following averment: "The respondent says that the making of said plat by said Woollacott was and is a voluntary dedication of said lot 18 to the public, and to the city of Chicago, and to the persons to whom he subsequently sold and conveyed the said lots 1 to 7 inclusive."

On May 1, 1893, the appellant sold to Alice D. Foster said lot 3 in Woollacott's re-subdivision above described, which fronts on said lot 18, marked on the plat as "Lake View avenue." Upon lot 3 so sold to Alice D. Foster there has been constructed a brick and marble residence. On or about May 1, 1893, appellant constructed buildings on lots 1, 2 and 4 and lots 5, 6 and 7 in said re-subdivision aforesaid, lots 1, 2 and 4 fronting on said lot 18 designated on the plat as "Lake View avenue." In 1894 appellant conveyed lots 1, 2 and 4, fronting on Lake View avenue, and lots 5, 6 and 7 fronting on Roslyn place to the Commercial National Bank of Chicago, or its cashier, John B. Meyer. This quit-claim deed to Meyer was exe-

cuted as a mortgage security, and was foreclosed, and the master's deed executed to the bank in September, 1896, followed by a deed executed to the bank by the appellant himself on March 20, 1897.

On November 27, 1893, the city passed an ordinance for the erection of lamp-posts on Lake View avenue from Roslyn place south of Arlington place, to be so erected under the superintendence of the department of public works.

On February 14, 1894, the city council of Chicago repealed the ordinance of November 15, 1886, for the opening and extension of Lake View avenue to the uniform width of fifty feet from the south line of St. James place to the north line of Fullerton avenue. On February 28, 1894, upon motion of the city attorney, an order was entered that the judgment of condemnation, entered on January 7, 1888, and all other judgments, rendered in said original proceeding, be and were thereby vacated and set aside, and the assessment roll filed therein annulled, and the petition dismissed, and the cause stricken from the docket of the court.

On May 4, 1896, the city council of Chicago passed an ordinance for paving and curbing the roadway of Lake View avenue from the south line of Roslyn place to a point one hundred and seventy-three feet south of the south line of Arlington place. Lake View avenue was paved and curbed by the city in accordance with said ordinance. Previously to the middle of November, 1898, the Commercial National Bank had sold and conveyed the lots and buildings, so deeded to it by appellant, to other persons. When appellant began to construct the houses fronting on what was lot 18 in Goudy & Goodwillie's subdivision, and what was marked as "Lake View avenue" on the plat of appellant's re-subdivision, appellant appropriated from six to eight feet of the west side of said lot 18 for sidewalks for the houses so fronting on lot 18.

HAMLIN & BOYDEN, and JAMES J. BARBOUR, for appellant.

CHARLES M. WALKER, Corporation Counsel, and THOS. J. SUTHERLAND, for appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The proviso to section 53 of article 9 of the City and Village act, passed as an amendment in 1891, is as follows: "*Provided, however, in all proceedings heretofore commenced, where the property has not been fully paid for, or that shall hereafter be commenced, said city or village shall take and pay for the lands sought to be taken or damaged within two years of the entry of judgment in such condemnation proceedings. And after the expiration of such time the court in which the proceedings may have been had, upon a motion of any person interested in the lands, may inquire in a summary manner whether the lands in which such person is interested have been taken or damaged and paid for; and if the court finds that such lands have not been taken or damaged and not been paid for, it shall enter an order requiring the city or village to pay for such lands within a short day, to be fixed by the court; and in default thereof shall dismiss such proceedings as far as they relate to lands of such person. If, however, the court finds that such city or village has taken possession of the land and has not paid therefor, it shall enter an order requiring such city or village to pay the amount of the condemnation judgment, with interest from the time of such taking, within a short day to be fixed by the court; and in default thereof, to dismiss the proceedings and enter a several judgment in favor of such land owners for interest from the day of such taking, and direct the issue of a writ of possession in favor of the several owners or their legal representatives or grantees, re-*

spectively. And such dismissal as aforesaid shall operate as a bar to further proceedings under such ordinance against the land affected by such dismissal. And every such cause shall be considered as pending in the court in which the same has been, or shall be commenced, until all the lands sought to be taken are paid for, or until the proceedings are dismissed where the lands have not been taken." (1 Starr & Cur. Ann. Ill. Stat.—2d ed.—p. 779).

The proviso above quoted provides for the making of a motion by any person interested in the land. In this case, appellant did not make a motion, as specified in the proviso to section 53, but filed a regular petition in the condemnation and assessment proceeding, to which petition, appellee, the city of Chicago, filed an answer. Upon the petition of appellant, so filed *nunc pro tunc* as of March 8, 1899, and the answer of appellee thereto, an issue was made, testimony was taken before the court, and propositions of law were submitted to the court. We deem it unnecessary to decide, whether, under a statute which provides for the making of a motion by a person interested in the property involved, and confers upon the court, before whom the motion is made, the power to make an inquiry in a summary manner, parties may proceed to file a petition and answer, and take testimony, and try an issue thus formed, as though an original case was pending in court. The statute evidently contemplated nothing but the making of a mere motion to be disposed of by the court in a summary manner. As, however, both parties have in this proceeding presented the matter as an issue formed upon pleadings, and proofs taken, and propositions of law submitted, we will consider the points involved without reference to the propriety of the course pursued.

The petition, filed by the appellant upon March 24, 1900, *nunc pro tunc* as of March 8, 1899, prays for a judgment, awarding interest upon the amount of the judgment of condemnation for \$5000.00 from the date of the



alleged taking possession of the property sought to be condemned by the city, and also directing the issuance of a writ of possession for said property in favor of appellant. It is impossible to see how the prayer of this petition could have been granted by the court below. The statute not only provides for a judgment in favor of the land owner for interest from the date of taking possession, but it also provides for the issuance of a writ of possession in favor of the several owners, or their legal representatives, or grantees, respectively. The property, which the appellant asks to be put in possession of through a writ of possession, is a part of Lake View avenue, a public street of the city of Chicago. It is the same property, which was lot 18 in Goudy & Goodwillie's subdivision, and which, in the original condemnation proceeding, is described as a strip of land fifty feet wide off the easterly side of lot 4 and off the south twenty-seven and one-half feet in width of lot 3 in assessor's division of lot 4 of Wrightwood. Lots 1, 2, 3 and 4 of appellant's re-subdivision, which are parts of lots 19 and 20 of Goudy & Goodwillie's subdivision, front, with the buildings erected thereon, upon this portion of Lake View avenue, formerly designated as lot 18. Lots 1, 2, 3 and 4, with the buildings thereon, which thus front upon this portion of Lake View avenue, are not now owned by the appellant, but by grantees from the appellant. These grantees are not parties to this proceeding. The appellant could not hold the portion of Lake View avenue, upon which these lots and buildings front, as against his grantees, the owners thereof, because he sold the lots and buildings to them with the understanding that their property was to face upon this street. They thereby became vested with an easement in the street for the purposes of ingress to and egress from their property. The court below could not ignore the rights of these grantees, and make an order, which should put the appellant in possession of the street in front of their prop-

erty. Appellant, not being entitled to the possession of the strip of land known as lot 18, is not entitled to interest on the judgment. The two, interest on the judgment and possession of the property, go together under the statute; and there is no authority for awarding interest money where possession does not go with it.

Appellant on October 29, 1892, made a re-subdivision of lots 19, 20 and the east thirty feet of lot 21 of Goudy & Goodwillie's subdivision, and platted the same, and marked upon said plat what had formerly been lot 18 as "Lake View avenue," and recorded the plat. It is not denied in this case that the plat of this re-subdivision was made, acknowledged and recorded in strict compliance with the requirements of the statute. This being so, there was a statutory dedication to the city of Chicago of the property now in controversy, being that portion of Lake View avenue on which lots 1, 2, 3 and 4 of appellant's re-subdivision front.

Section 3 of chapter 109 of the Revised Statutes in regard to "Plats" provides, that "the acknowledgment and recording of such plat shall be held in law and in equity to be a conveyance in fee simple of such portions of the premises platted as are marked or noted on such plat as donated or granted to the public. \* \* \* And the premises intended for any street, alley, way, common or other public use in any city, village or town, or addition thereto, shall be held in the corporate name thereof in trust to and for the uses and purposes set forth or intended." (3 Starr & Cur. Ann. Stat.—2d ed.—p. 2966). This court has held in a number of cases that, where a plat is executed, acknowledged and recorded in conformity with the provisions of the statute, it will operate as effectually, as a deed would operate, to convey the title of the streets therein mentioned to the municipality. (*Village of Princeville v. Auten*, 77 Ill. 325; *Maywood Co. v. Village of Maywood*, 118 id. 61; *Rees v. City of Chicago*, 38 id. 322; *Canal Trustees v. Haven*, 11 id. 554; *Gebhardt v. Reeves*, 75 id. 301.)

Appellant contends, however, that dedication is a question of intention, and that he did not intend to make a dedication of the strip in question to the public. Counsel for appellant in their brief enumerate certain circumstances which, as they claim, show an intention not to make a dedication. The circumstance, which is mainly relied upon in support of this position, is the fact that the city had commenced a condemnation proceeding, had obtained a judgment for the condemnation of the strip in question, had assessed the balance of the property from which the street was to be taken for benefits derived from the improvement, and had filed an answer to the petition of March 19, 1892, saying that such assessment would be collected. Appellant insists, that he was entitled to rely upon the condemnation of the property by the city for a street, and that, therefore, his making, acknowledging and recording the plat of his re-subdivision did not indicate an intention to dedicate the strip in question, but merely an intention to prepare for and take advantage of the proposed action of the city in the condemnation proceeding. Under the law the city had a right to dismiss its proceeding, and vacate the judgment, and appellant was bound to know the law in this respect. He filed a petition on March 19, 1892, reciting that the city had not taken possession of the strip in question, and asking that the city be required to pay the sum awarded for the strip within a short day to be fixed by the court, and that, in default of such payment, the proceeding should be dismissed, so far as the same related to the appellant's lands. It thus appears, that in March, 1892, the appellant himself asked for a dismissal of the petition in case of failure to pay the amount of the award within a short time. After filing his petition on March 19, 1892, appellant took no further steps therein, nor, so far as the record shows, ever called the matter to the attention of the court. He never obtained from the court an order, that the city be required to pay the award with-

in a fixed time. The laying of the water pipe in the strip in question took place on March 19, 1892, the very day on which appellant filed his petition. He did not frame the petition upon the theory that the city was in possession of the property, but upon the theory that the city had not taken possession. The construction of the water pipe would not make the city "liable to an amount found as the value of the premises for purposes of a street." (*Pearce v. City of Chicago*, 176 Ill. 152). If the laying of the water pipe, however, was an act of possession, appellant must have had notice of it at the time of the filing of his petition, or shortly thereafter; but he made no motion to amend the petition, and to allege the fact that possession had been taken of the strip, and that he was entitled to a writ of possession. On the contrary, the proceeding begun on March 19, 1892, was allowed to drag along without any action whatever on the part of the appellant, until the city itself in February, 1894, repealed the ordinance, vacated the judgment, annulled the assessment, and dismissed the petition. This dismissal of the proceeding was the very result, for which the appellant prayed in his petition of March 19, 1892. He took no further proceedings towards the enforcement of the judgment, or the obtaining of possession, until after a lapse of more than five years after February, 1894, when the city dismissed the proceeding, to-wit, until March 8, 1899, when he filed the present petition under section 53 as amended.

When appellant made and recorded the plat of his re-subdivision on October 29, 1892, it may as well be presumed that he did so in reference to the future dismissal of the condemnation and assessment proceeding, as that he did so in reference to any expected consummation of that proceeding by the city. When the condemnation and assessment proceeding was dismissed and ended, the city had no right to take possession of the strip in question, except by virtue of the dedication which he made

by the filing and recording of his plat. (*City of Chicago v. Hayward*, 176 Ill. 130).

It is true that dedication is a question of intention, though this rule applies more particularly to common law dedications (*City of Chicago v. Stinson*, 124 Ill. 510; *Town of Lake View v. LeBahn*, 120 id. 92) than to statutory dedications, where the execution and recording of the plat in conformity to the statute vest the title to the streets, or other public property, in the municipality, just as a deed would vest it; we do not, however, hold that the question of intention has no application to the filing and recording of statutory plats. It may be conceded for the purposes of this case, that the question of intention applies as well to dedication by statutory plats, as to dedications at common law; and yet it is settled law, that the acts and declarations of an owner of property may be such, as to equitably estop him from denying an intention to dedicate. (*Waggeman v. Village of North Peoria*, 155 Ill. 545; *City of Ottawa v. Yentzer*, 160 id. 509). We think that the facts and circumstances, developed in this case, are of such a character, as to estop the appellant from denying an intention to dedicate this strip of land to the public for a street.

Where an owner of land plats it, and sells lots bounded by streets, designated upon the plat as streets, he thereby indicates a clear intention to dedicate. (Angell on Highways,—2d ed.—sec. 142; 9 Am. & Eng. Ency. of Law,—2d ed.—p. 34). Where an owner has made a plat, and sold parts of the land platted with express reference to the plat, it will be presumed that he intended to dedicate the parts, designated for public uses, to such public uses. The dedication, evidenced by the filing or recording of a plat, becomes complete when lots have been sold with reference to the plat, and the public has accepted the dedication either expressly or by user. (9 Am. & Eng. Ency. of Law,—2d ed.—pp. 41-60, inclusive). The owner is estopped to deny dedication where private rights have

intervened. (*Littler v. City of Lincoln*, 106 Ill. 353). Where lots are sold according to the plat, the purchasers of lots acquire the right to have the streets, delineated upon the plat, kept open. (9 Am. & Eng. Ency. of Law,—2d ed.—p. 57; *Field v. Barling*, 149 Ill. 556). The act of the owner in platting, etc., is in the nature of a mere offer to the municipality, and the municipality cannot be bound to open or to improve the streets, designated upon the plat, until there is an acceptance by such municipality. (*Littler v. City of Lincoln*, *supra*; *Hamilton v. Chicago, Burlington and Quincy Railroad Co.* 124 Ill. 235; *Woodburn v. Town of Sterling*, 184 id. 208).

An application of the principles, announced in the authorities above referred to, to the case at bar makes it clear, that appellant is here precluded and estopped from denying an intention to dedicate. This estoppel not only here operates in favor of the private owners, to whom he has sold property abutting upon the street in question, but it also operates in favor of the city of Chicago by reason of its acts of acceptance. The appellant so platted his lots as to make them front upon the street in question, and then built buildings upon his lots, and sold the lots and buildings to third persons. He also built sidewalks in front of the houses and lots so sold, and upon the strip of ground in question. These acts on his part in connection with the execution and recording of the plat in question, estop him from denying an intention to dedicate. The proof shows that in November, 1893, the city passed an ordinance for the erection of lamp-posts upon the strip in question, and in May, 1896, passed an ordinance for paving and curbing the street in question, and did so curb and pave it in accordance with the ordinance. These acts on the part of the city, performed as they were after appellant had recorded the plat of his re-subdivision, indicate an acceptance of the street thereon designated as "Lake View avenue." The testimony tends to show, that such acts on the part of the

city were not done for the purpose of taking possession under the condemnation judgment, because the condemnation proceeding was vacated and dismissed. Without a condemnation the city had no right to take possession, but would have been a mere trespasser. (*City of Chicago v. Hayward*, 176 Ill. 130; *Pearce v. City of Chicago*, 176 id. 152). The acts, which appellant interprets as a taking of possession by the city under the condemnation judgment, are rather to be regarded as acts of acceptance by the city of the offered dedication indicated by the plat. The appellant might have had a right to withdraw the offer of dedication made by the filing and recording of his plat, but he attempted no such withdrawal, until after the intervening of private rights, and the acceptance of the city.

We are of the opinion that the court below committed no error in refusing to enter an order in favor of the appellant for interest upon the amount of the condemnation judgment and for a writ of possession to put him in possession of the strip in question. Accordingly, the judgment of the superior court of Cook county is affirmed.

*Judgment affirmed.*

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JOHN FREDERICK KEHM

v.

MARIAN MOTT *et al.*

*Opinion filed October 19, 1900.*

**PLEADINGS**—*effect, on foreclosure, of general denial that defendant has some interest in property.* A general allegation in a foreclosure bill that a defendant, not a party to the mortgage, claims some interest in or lien on the premises which is inferior to the mortgage, puts such defendant under the duty of setting up such interest by way of answer, and if he merely denies the allegations of the bill he is estopped by such denial from afterwards claiming any interest in the premises.

*Kehm v. Mott*, 86 Ill. App. 549, affirmed.

187	519
208	188

187	519
211	507
111a	197

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. ELBRIDGE HANEY, Judge, presiding.

JAMES A. PETERSON, for appellant.

JAMES E. MUNROE, for appellees.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This is a proceeding in equity begun by Thomas Mott, against Olof O. Ostrom and others, in the circuit court of Cook county, to foreclose a mortgage in the form of a trust deed. The instrument was executed June 16, 1893, by Ostrom, to Horace E. Hurlbut, trustee, conveying lot 2 in Ostrom's subdivision of certain lots in Chicago, to secure the payment of a note of \$8000, signed by Ostrom, of same date, to Mott, due five years after date, with interest at five per cent per annum until due and seven per cent thereafter. Default being made in the payment of the principal when due, this bill was filed August 8, 1898, to foreclose. After setting up the trust deed and the default in payment of money due, it is alleged that the trust deed is a paramount and first lien upon the lot in question; that John Frederick Kehm, Emma Kehm and others, (naming them,) "have or claim to have some interest in or lien upon said premises conveyed by said deed of trust, but such interest or lien, if any they or any of them have, was acquired long subsequent to the time when such deed of trust became a lien," etc.; that there appear upon the records of Cook county two certificates of sale made by the master in chancery, one conveying the lot in question to John Frederick Kehm and Emma Kehm for \$1241, the other conveying the same lot to Emil R. Haas for \$5000. The bill makes these parties, and others, defendants, and the prayer is that in default of payment within a short day the premises be sold to satisfy complainant's debt; that a defi-



ciency decree may be awarded to complainant for the amount of the debt after applying the proceeds of the sale, and that a receiver be appointed to collect the rents during the pendency of the proceeding. Soon after the filing of the bill the court appointed Emil R. Haas receiver of the premises in controversy, to collect the rents, etc. The Kehms were served with process, and filed first a general demurrer, and later filed an answer denying "each and all the allegations of said complainant in his said bill of complaint contained, and call for strict proof of the same." Upon a hearing, after evidence taken and reported by a master in chancery, together with his conclusions of law and fact, a decree was entered in accordance with the prayer of the bill. Upon appeal by the Kehms to the Appellate Court for the First District the decree below was affirmed, and John Frederick Kehm now prosecutes this further appeal.

The several grounds of reversal now urged are, that the chancellor committed error in appointing Emil R. Haas, a defendant, receiver; in entering the order appointing the receiver without notice to appellant; in determining adverse titles to the property in controversy, and in allowing complainant, as a part of the costs, a solicitor's fee of \$350.

When a bill to foreclose a mortgage joins as defendants several persons who were not parties to the instrument, under the general allegation that they have or claim to have some interest in or lien upon the premises in controversy which is inferior to the lien of the mortgagor, it is unnecessary to set forth the nature or character of the interest or lien so claimed, the general allegation being sufficient. Such an allegation puts the defendant under the duty of setting up his interest by way of answer and establishing it by proof. This rule is founded upon the theory that the complainant, while bound to know the circumstances affecting his own title, is not supposed or required to know the particulars of

the title of his adversary. 2 Jones on Mortgages, secs. 1473, 1474, and authorities cited.

The bill alleges that defendants have some interest in or claim against the land in controversy, and also sets up a certificate of sale under which defendants claim. The general denial directly traverses these allegations. It is said in section 1474 of Jones on Mortgages, *supra*, that when it has been alleged defendant has some interest in the property, and the latter answers by a general denial, "he is in no condition to question a judgment foreclosing the defendant of all right, title and interest in the premises adverse to the plaintiff, because his answer denies that he has any claim or interest therein." Appellant, therefore, must be held estopped by his answer from claiming any interest in the premises in question. (*Finch v. Martin*, 19 Ill. 105.) It is a familiar rule in chancery pleading and practice that a defendant must set up his defense by plea or answer, and cannot avail himself of any defense not so set up, even if proven by the evidence. *Johnson v. Johnson*, 114 Ill. 611; *Jewett v. Sweet*, 178 id. 96.

Aside from this view, which is a conclusive answer to all the grounds of reversal attempted to be urged by appellant, we are of the opinion, after an examination of the several points raised, that in any view of the case none of them are well assigned. The first and second assignments of error were waived by appellant because no objection was made in apt time. In fact, the record fails to disclose that these questions were raised at all below. The solicitor's fee is objected to upon this appeal because he was named in the trust deed in question as a successor in trust, and for that reason could not properly be allowed a solicitor's fee in this cause. The contingency upon which he was to have been a successor in trust never happened and he never acted as trustee. Moreover, this objection was neither made before the master nor preserved in the exceptions to his report. This decree does not attempt to settle adverse legal title.

A reversal of the decree below on any of the points urged by appellant would serve no end of justice, but would simply delay the parties who are equitably entitled to relief. The trust deed clearly appears to be a prior lien upon the premises. The decree of the court below is equitable and just, and no injury whatever has been done to appellant. The judgment of the Appellate Court affirming that decree is affirmed.

*Judgment affirmed.*

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THE CHICAGO AND ALTON RAILROAD COMPANY

v.

CATHERINE CULLEN, Admx.

*Opinion filed October 19, 1900.*

187	523
95a	1626

1. RAILROADS—*what is not contributory negligence by section foreman.* A section foreman, who, upon the approach of a freight train, steps aside to a distance ordinarily safe, is not, as a matter of law, guilty of negligence contributing to an injury from a loose car door, which was swinging out from the train and which he did not see in time to avoid such injury.

2. SAME—*right of section foreman to assume that car doors are fastened.* If a section foreman, in the line of his employment, is in the exercise of reasonable care for his safety, he may assume that the railroad company will use reasonable care to see that the car doors on its trains are in a reasonably safe condition, and the jury may consider such fact when determining whether the section foreman was in the exercise of due care.

*Chicago and Alton Railroad Co. v. Cullen*, 87 Ill. App. 374, affirmed.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding.

A. E. DEMANGE, (WILLIAM BROWN, of counsel,) for appellant.

SAMPLE & MORRISSEY, for appellee.

Per CURIAM: This is an appeal from a judgment of affirmance by the Appellate Court against appellant, in favor of appellee. The Appellate Court filed with its judgment the following statement of the case and opinion, by WRIGHT, P. J.:

"In this action the appellant was sued by appellee for damages by negligence resulting in the death of John Cullen intestate. The declaration, consisting of two counts, alleges that John Cullen was section foreman for appellant over a portion of the track, including that part running two miles north of McLean, Illinois, and while in discharge of his duties as such, in the exercise of ordinary care for his own safety, appellant negligently ran a freight train over that section of track with one of the car-doors of a freight car in defective condition and out of repair, so that it swung out at the bottom from the side of the car when the train passed intestate and struck and killed him, leaving his widow and four children deprived of support. Trial by jury resulted in a verdict and judgment against appellant for \$5000, from which this appeal is taken to effect its reversal, and it is urged as error that the court admitted improper evidence and excluded proper testimony; that the court denied the motion and refused the instruction, offered at the close of appellee's testimony and again at the close of all the testimony, to direct a verdict for appellant; that the court gave improper, refused proper and modified proper instructions.

"The evidence shows that while deceased, in the discharge of his duties as section foreman, was upon the track about a mile north of McLean, a freight train approached, and the deceased, and a workman with him, stepped off to the side away from the track several feet, to the distance usually taken by workmen of that class when trains passed. As the engine went by him the deceased recognized and saluted a friend in the cab, whom he followed with his eyes, and directly his companion,

the workman, gave a shout of warning and ducked his head. At the same time a boy walking upon the track near by, seeing the danger, quickly swerved out of the way. Almost instantly, and before the deceased became aware of any peril, a loose door hanging from the side of a furniture car, swinging out, struck him in the back of the head and killed him. This car-door was of a common sliding pattern, hung from the top, its bottom coincident with the floor of the car and confined to its proper place inside by a strip or band of iron, out of which it was possible for the door to jump or bound by conjunction of favorable circumstances, in which event the bottom of the door would swing to and from the side of the car with the wind pressure and swaying of the car in motion. When closed, the door could be fastened by hasp and staple. It further appears that while the train was yet several miles distant from the place of the injury a brakeman discovered this door in its loose condition, swinging in and out, the bottom of the door being free from its fastening, the hasp loose from the staple. The discovery was made on the occasion of the train breaking in two and after the coupling had been made and the train again started. An immediate stop was made, and the brakeman, assisted by others, made an ineffectual attempt to close the door in the usual manner and fasten it. The conductor of the train was apprised of the condition of the door, and he, with the two brakemen, replaced the door in its hangings, but on account of some disorder in the appliance it could not be made to shut tightly so the hasp could be fastened, a space of two inches being left open. It is explained by them that lack of proper tools caused the failure to completely remedy this defect. Having arrived at Atlanta station, seven miles before Cullen was struck, a stop was made, and during the stay of the train here the conductor again examined the door, and finding it in the same condition as when left by him before, no further attempt was made to

fasten it. After leaving Atlanta no stop was made until after Cullen was struck, and none of the train crew saw the accident. The head brakeman, who rode on the engine, and the fireman, both testify they kept watch back over the train and did not see the door again swinging until after the accident.

"Geometrical demonstration is invoked to prove that Cullen must have stood within three feet seven inches of the nearer rail when he was struck, and the calculation is based upon the assumption that the car-door hung by both corners at the top, properly. Very much strong proof,—and the preponderance, we consider,—is against this contention and to the effect that the car-door hung by one corner only, and that Cullen stood more than five feet from the nearer rail. His workman stood the same distance away. They were men of long experience in the line of their employment. On the approach of this train they withdrew to a distance ordinarily safe,—about the same space from the rails that was customary and usual. Having done that, in the absence of contributory negligence otherwise, we are impelled to conclude that the deceased was in the exercise of ordinary care for his own safety.

"As against the charge of negligence on the part of appellant regarding the condition of the car-door, it is said appellant had neither time to discover the defect nor actual notice of it. The answer to this is, that the trainmen, including the conductor, who were in charge of the train, not only knew of the defective condition of the door but endeavored to remedy it, and concluded that they had sufficiently secured it when they desisted from their efforts to do so. It was the master's duty to use reasonable care to remedy this defect so long as the door formed a part of the train, or upon knowledge of such defect to desist in the use of it if it was dangerous to others,—which latter fact the accident demonstrated. While it may be true the master, or some employee hav-

ing the relation of vice-principal, had neither time to discover the defect nor actual notice of it, yet the trainmen were not fellow-servants of the deceased, and it was their duty, upon discovering the defective condition of the car, to report it to the master for repair and to cease the use thereof until it was restored to a reasonably safe condition. This they neglected to do, and in consequence thereof Cullen was killed. As between appellee and appellant, the latter is responsible for such negligence of its servants in charge of the train. Whether appellant's servants who managed the train were guilty of negligence being a question of fact determined against appellant by the jury, it only remains to consider the evidence to say that conclusion was warranted. Having so considered the evidence we feel that such a conclusion was irresistible.

"It is insisted that the court erred in permitting testimony concerning a switch-stand at Shirley, Illinois, some five miles from the scene of the accident, which this car door struck. We find evidence of that fact in the direct testimony of two of appellant's witnesses, and while the evidence complained of is not strictly material to the main issues involved and might well have been excluded, it merely elucidates and explains the circumstances in detail. Had the evidence produced by appellant upon this point in chief been withdrawn a different question might have been presented, but in the present condition of the record it is difficult to see that any harm was done by the admission of the evidence. Indeed, there was none.

"The second instruction for appellee, which it is said was erroneously given, we have carefully examined. It states the rule to be, that if Cullen, in the line of his employment, was in the exercise of reasonable care for his own safety, then he had the right to assume, in the absence of notice to the contrary, that appellant would use reasonable care and diligence to see that the car doors on a train running upon the track of appellant were in

a reasonably safe condition, and that the jury have the right to take that into consideration, in connection with all the facts and circumstances, in determining whether or not, at the time he was injured, Cullen was exercising due and reasonable care for his personal safety. The force of criticism against this instruction is not seen. It does not single out any particular fact in the proof to appellant's prejudice, but is merely directed to the question whether the deceased was in the exercise of ordinary care, and states only general rules applicable to the determination of it, so that we cannot say any harmful error to appellant resulted from giving it.

"It is quite needless to allude to the motion and instruction offered to direct a verdict for appellant, which the court properly refused. That no error exists in any of the other instructions, in giving, refusing or modifying them, is also our conclusion upon their examination, although fifteen of appellant's offered instructions were refused while sixteen were given.

"We think the case was fairly presented to the jury for the appellant, and are convinced that the judgment of the trial court must stand."

The briefs and arguments filed here are manifestly the same as those used in the Appellate Court, and discuss at length questions not open to review in this court. We have considered the points made on the assignment of errors of law and consulted the authorities cited, so far as deemed necessary, and have reached the conclusion that such questions of law are all properly disposed of by the foregoing opinion. It will therefore be adopted as the opinion of this court, and the judgment below affirmed.

*Judgment affirmed.*



WILLIAM F. McDONALD

v.

THE ILLINOIS CENTRAL RAILROAD COMPANY *et al.**Opinion filed October 19, 1900.*

1. **PLEADING**—*if averment is equivocal the most unfavorable meaning must be adopted.* An averment that the defendant railroad companies agreed, after the A. R. U. strike of 1894, to furnish each other with information as to employees who left their service during such strike, "and that such employees of any and all said companies would not be employed by any of said companies without a release and consent from the railway company by which any such employee was last employed, *such release and consent being commonly called by railroad men a 'clearance,'*" does not charge that the consent of the company last employing a man should be essential to his employment by another company, but only that such ex-employee should not be employed unless he could produce a "clearance."

2. **SAME**—*when declaration does not charge breach of duty by railroad company to ex-employee.* A declaration charging that the defendant railroad company refused to give the plaintiff, an ex-employee, such a clearance as would "enable him to obtain employment in the railroad business," does not charge a breach of duty where it is not alleged that the company refused to give him any clearance whatever or a clearance setting forth truthfully all the facts proper to be stated therein.

MAGRUDER, J., dissenting.

*McDonald v. Illinois Central Railroad Co.* 83 Ill. App. 463, affirmed.

**WRIT OF ERROR** to the Appellate Court for the First District;—heard in that court on writ of error to the Circuit Court of Cook county; the Hon. GEORGE W. BROWN, Judge, presiding.

The circuit court of Cook county sustained a demurrer to a declaration filed herein by plaintiff in error August 7, 1896. Under an order granting leave to file an amended declaration, plaintiff in error, on the 15th day of January, 1898, filed the following declaration:

"William F. McDonald, plaintiff, by William J. Strong, his attorney, for his amended declaration, by leave of court, complains of the Illinois Central Railroad Com-

pany (a corporation) and the Chicago and Northwestern Railway Company (a corporation) of a plea of trespass on the case:

"For that whereas, heretofore, to-wit, on the 26th day of June, 1894, the plaintiff was and still is a citizen of the State of Illinois, living in the city of Chicago, county of Cook, in said State, and was by occupation a skilled railroad man, and had for about five years theretofore been employed by the defendant the Illinois Central Railroad Company as a switchman and conductor, and the plaintiff was and still is, by reason of his long experience, skill and good habits, a safe and competent railroad operator, well qualified for and adapted to follow the lucrative calling of switchman and conductor.

"And plaintiff further avers that prior to the 6th day of August, 1894, and up to and including, to-wit, the 26th day of June, 1894, he was in the employ of the defendant the Illinois Central Railroad Company as a switchman and conductor, which said employment was a lucrative and profitable one for the plaintiff, and which he, by reason of his long experience and by reason of qualifications which he possessed, had reason and cause to believe would continue to be one of great gain and profit to him; that on or about the 26th day of June, 1894, he voluntarily left the service of the defendant the Illinois Central Railroad Company.

"Plaintiff further states that before the said 6th day of August, 1894, and before the acts complained of herein, the defendants entered into a conspiracy, agreement and understanding with certain other railroad companies having lines of railway running into the said city of Chicago, (to-wit, all the railroad companies having lines running into said city of Chicago,) namely: the Atchison, Topeka and Santa Fe; the Baltimore and Ohio; Chicago and Erie; Chicago and Grand Trunk; Chicago and Western Indiana; Chicago, Burlington and Quincy; Chicago Great Western; Chicago, Milwaukee and St. Paul;

Chicago, Rock Island and Pacific; Cleveland, Cincinnati, Chicago and St. Louis; Lake Shore and Michigan Southern; Louisville, New Albany and Chicago; Michigan Central; New York, Chicago and St. Louis; Pennsylvania; Wisconsin Central; Wabash; Union Stock Yard and Transit Company; Calumet and Blue Island; Belt Railway Company; Pittsburg, Cincinnati, Chicago and St. Louis; Pittsburg, Ft. Wayne and Chicago; Chicago and Eastern Illinois, and Chicago and Southwestern Railway Company; that they, the said railroad companies, would furnish, each to the other, information as to all their employees who had committed offenses or who were charged with having committed offenses, and also as to all their employees who had left their service during the strike which commenced on or about June 26, 1894, and ended on or about August 6, 1894, commonly known as the A. R. U. or American Railway Union strike, and as to all their employees who were members of the A. R. U. or American Railway Union, and that such employees of any and all said companies would not be employed by any of said companies without a release and consent from the railway company by which any such employee was last employed, such release and consent being commonly called by railroad men a 'clearance,'—which said conspiracy and agreement, so entered into as aforesaid, was a conspiracy and agreement to blacklist and boycott such employees, the object and purpose of which conspiracy and agreement was to maliciously and wantonly interfere with such employees who had so previously terminated their employment with or been discharged from the employment of either of said railroad companies, in and about obtaining employment with any other of said railroad companies in the city of Chicago.

"Plaintiff further alleges that said conspiracy and agreement, so entered into between the railroad companies having lines running into Chicago, was, prior to the commencement of this action, entered into by all

the railroad companies operating railroads in the United States, which said conspiracy and agreement is still in force among the railroad companies having lines of railway running into the city of Chicago, aforesaid, as well as all other railway companies operating railroads in the United States, including the Toledo and Ohio Central Railroad Company, hereinafter mentioned. Plaintiff says that he left the service of the defendant the Illinois Central Railroad Company during the strike commonly known as the A. R. U. or American Railway Union strike, which began on or about the 26th day of June, 1894, and ended on or about the 6th day of August, 1894, and after he so left the employment of the defendant the Illinois Central Railroad Company, and before the commencement of this suit, the said defendant the Illinois Central Railroad Company did willfully and maliciously, and in pursuance of said conspiracy, agreement and understanding above set forth, and with the intent willfully and maliciously to prevent plaintiff from securing employment, refuse to give plaintiff such release and consent as would enable him to obtain employment in the railroad business, and with the intent willfully and maliciously to interfere with the plaintiff in his endeavor to secure employment in the railroad business and to prevent him from securing such employment, cause to be made known to said other railroad companies, including the Toledo and Ohio Central Railroad Company, that he, the plaintiff, had quit the service of it, the said defendant the Illinois Central Railroad Company, during said A. R. U. strike; that such information aforesaid, so made known by the defendant the Illinois Central Railroad Company, was given and made known by the defendant the Illinois Central Railroad Company to said other railroad companies with the willful and malicious intent of preventing the plaintiff from securing employment in the railroad business, for which he was well qualified, and the defendant the Illinois Central Railroad Company thereby

requested the enforcement of said above described preconcerted conspiracy and agreement so entered into with said various other railroad companies that said various other railroad companies should not employ the plaintiff in any branch of their service for which he, the plaintiff, was well qualified, without the plaintiff first obtained the consent of the said defendant the Illinois Central Railroad Company, which consent the defendant the Illinois Central Railroad Company (though requested by the plaintiff so to do) refused and still refuses to give; and the plaintiff says that in consequence thereof, and for no other cause or causes, he has been denied the right of engaging in his usual occupation as a skilled railroad man, and has been denied employment by the defendant the Chicago and Northwestern Railway Company and by the Toledo and Ohio Central Railroad Company, which railroad companies were parties to said conspiracy, and to which railroad companies he has applied for employment since leaving the service of the Illinois Central Railroad Company and before the commencement of this suit, and was discharged from the employment of the defendant the Chicago and Northwestern Railway Company and the Toledo and Ohio Central Railroad Company, from which companies he had secured employment after leaving the service of the Illinois Central Railroad Company, and before the commencement of this suit, and thereupon and thereby the plaintiff was denied employment by said Chicago and Northwestern Railway Company and by said Toledo and Ohio Central Railroad Company, and though he has assiduously applied for work to a great number of railroad companies in the United States, to-wit, all the railroad companies in the United States operating railroads, he has, by reason of the willful and malicious conduct and agreement of the defendants and other railroad companies heretofore set forth, and for no other cause or causes, been denied the right of contracting for and obtaining employment with any of said railroad com-

panies, and has been prevented from obtaining employment, and has been prevented from supporting himself by his trade and occupation and by his free labor, and prevented from supporting those dependent upon him for the necessities of life, and has suffered great mental anguish, and has lost divers great gains and profits which he might and would otherwise have acquired, and is otherwise damaged and injured by the said willful, malicious and illegal acts of the defendants.

"And the plaintiff says that the defendants have, from the 6th day of August, 1894, hitherto continued this willful, malicious and illegal interference with this plaintiff in and about procuring employment, and that he is now prevented thereby from obtaining employment, as aforesaid, and has lost great emoluments and profits which he might and otherwise would have acquired from his trade and occupation as a skilled railroad man, and the plaintiff, being inexperienced in other kinds of labor, cannot obtain employment except that of a lower class or degree, and not as profitable to the plaintiff as employment in his trade and occupation as a skilled railroad man, to his damage in the sum of \$50,000," etc.

The court sustained a general demurrer to this declaration. The plaintiff in error abided his pleading, and judgment was entered accordingly. The record was brought into the Appellate Court for the First District by writ of error, and the judgment of the circuit court was there affirmed. This is a writ of error to bring the record into review in this court.

WILLIAM J. STRONG, for plaintiff in error.

SIDNEY F. ANDREWS, (JAMES FENTRESS, of counsel,) for defendant in error the Illinois Central Railroad Co.

E. E. OSBORN, (A. W. PULVER, and LLOYD W. BOWERS, of counsel,) for defendant in error the Chicago and Northwestern Railway Co.

Mr. CHIEF JUSTICE BOGGS delivered the opinion of the court:

Counsel for plaintiff in error, in support of his insistence the circuit court erred in holding the declaration did not state a cause of action, says: "The question presented by the declaration and demurrer (when shorn of legal phraseology) is simply this: Is it lawful for all the employers in any line of industry to combine and agree that they will not hire any of each other's employees who have left the service of any one of them, unless the employer whose service he has left gives his consent that such employee may be employed? Or, to put it in another form: Is it lawful for all the employers in any line of industry to combine and conspire together to punish a man who leaves their service during a strike by refusing him employment, and thus preventing him from securing employment at his trade, unless his former master emancipates him by giving his consent to his employment?"

We do not think the question in either of its forms was presented to the trial judge by the pleadings. The allegation of the declaration is, "said defendant railroad companies" (defendants in error and other railroad corporations named therein) "entered into a conspiracy, agreement and understanding that they, the said railroad companies, would furnish each to the other information as to all their employees who had committed offenses or who were charged with having committed offenses, and also as to all their employees who had left their service during the strike which commenced on or about June 26, 1894, and ended on or about August 6, 1894, commonly known as the A. R. U. or American Railway Union strike, and as to all their employees who were members of the A. R. U. or American Railway Union, and that such employees of any and all said companies would not be employed by any of said companies without a release and consent from the railway company by which any such

employee was last employed, such release and consent being commonly called by railroad men a 'clearance.'" The meaning of the averment is equivocal. Counsel for plaintiff in error, ignoring a portion of the language, construes the declaration to charge that said defendant corporations agreed former employees of either company should be required to have an instrument expressing the consent of the former employer to the subsequent employment by another company. That portion of the averment, alone considered, would as well bear the other construction: that the agreement was such employee should show he had been released from his former employment or had quit with the consent of his employer. But the averment in its entirety is to be resorted to to ascertain the true meaning of the instrument denominated a "release and consent," and if two or more meanings present themselves, that which is most unfavorable to the pleader is to be adopted. (4 Ency. of Pl. & Pr. 759.) The pleader, in obedience, as we must assume, to his duty to state issuable facts, distinctly and definitely declares the "release and consent" referred to to be that which is commonly known and called among railroad employees a "clearance." The trial court then properly held the averment of the declaration to mean that the "release and consent" instrument referred to in the declaration was the ordinary clearance or clearance card in common use among railroad corporations and their employees.

This court, in *Cleveland, Cincinnati, Chicago and St. Louis Railway Co. v. Jenkins*, 174 Ill. 398, speaking of the instrument known as and called in railroad circles a "clearance" or "clearance card," said (p. 401): "A distinction is to be made between what is known, in terms, as a clearance card and a letter of recommendation. This distinction is apparent, not only from the evidence in this case, but also from the knowledge which courts have of the general conduct and management of railroad business and affairs. It is the duty of courts to take, and



they will take, judicial notice of the general business affairs of life, and of the manner in which ordinary railroad business is conducted, and of the every-day practical operation of them. (*Slater v. Jewett*, 5 Am. & Eng. Ry. Cas. 515; *Smith v. Potter*, 2 id. 140.) From the evidence produced on this question, and from this judicial notice which we take of the ordinary general management of railroads, it is apparent that what is known as a clearance card is simply a letter,—be it good, bad or indifferent,—given to an employee at the time of his discharge or end of service, showing the cause of such discharge or voluntary quittance, the length of time of service, his capacity, and such other facts as would give to those concerned information of his former employment. Such a card is in no sense a letter of recommendation, and in many cases might, and probably would, be of a form and character which the holder would hesitate and decline to present to any person to whom he was making application for employment. A letter of recommendation, on the contrary, is, as the term implies, a letter commending the former services of the holder, and speaking of him in such terms as would tend to bring such services to the favorable notice of those to whom he might apply for employment.”

Under every rule of construction of pleadings there is no issuable averment the companies defendant agreed the consent of either should be essential to the employment by the other of such companies of a discharged employee, but only that an employee who had voluntarily quit the employ of either of the companies during the strike should not be employed by the other unless he could produce the “clearance” or “clearance card” in common use among railroad circles, and commonly called by railroad men a “clearance.” The declaration, by its own language, explains that the instrument of “release or consent” referred to by the pleader is simply that known and commonly called a “clearance” among railroad men.

It is not averred the defendant companies, (defendants in error here,) or any of the corporations named in the declaration, agreed or had an understanding that employees who had joined in the strike mentioned in the declaration should not be granted "clearance cards." On the contrary, the inference deducible from all that is said on the point in the declaration is, that the railroad companies continued to grant clearances after the strike as before, and that plaintiff in error applied to defendant in error the Illinois Central Railroad Company for a "clearance card." The declaration does not charge said defendant company refused to grant him a "clearance card" or a "clearance" setting forth truthfully all facts proper to be stated in a "clearance card," but the language of the declaration is, said company refused to give him such an instrument as would "enable him to obtain employment in the railroad business." In what respect the release and consent or clearance which it is plainly inferred the company was willing to give the plaintiff was insufficient to enable him to procure employment from other railroad corporations is not disclosed. The declaration does not charge the Illinois Central Railroad Company refused to state fully and fairly all facts proper to be inserted in such an instrument, or that it inserted or desired to insert in the clearance any statement that was false or injurious to him or that had no proper place in his clearance paper. The company was not required to give him a clearance that would enable him to get employment from other companies operating railroads. As we said in the *Jenkins case*, *supra*: "Such a card is in no sense a letter of recommendation, and in many cases might, and probably would, be of a form and character which the holder would hesitate and decline to present to any person to whom he was making application for employment."

Whether the charge included in the question formulated by counsel for the plaintiff in error would constitute

a cause of action was not presented to the trial court by the declaration, and we agree with the view entertained by the trial court that the declaration failed to state a cause of action.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

Mr. JUSTICE MAGRUDER, dissenting.

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THE BURTON STOCK CAR COMPANY

v.

BENJAMIN BARNETT *et al.*

*Opinion filed October 19, 1900.*

This case is controlled by the decision in *Burton Stock Car Co. v. Traeger*, (*ante*, p. 9.)

APPEAL from the Circuit Court of Cook county; the Hon. E. F. DUNNE, Judge, presiding.

M. J. SCRAFFORD, and EDWARD A. BERN, for appellant.

JULIUS A. JOHNSON, County Attorney, and FRANK L. SHEPARD, Assistant County Attorney, for appellees.

Per CURIAM: The questions arising on this record are the same as those presented in *Burton Stock Car Co. v. Traeger*, (*ante*, p. 9.) Upon the authority of our decision in the latter case the judgment herein appealed from is affirmed.

*Judgment affirmed.*

OTTO S. LANCASTER *et al.*

v.

ROBERT H. LANCASTER *et al.**Opinion filed October 19, 1900.*

1. **WILLS**—*when devise to a class will take effect.* In case of a devise to a class, if the will does not expressly or impliedly fix a time when the devisees are to be ascertained or distribution made, the law fixes such time at the testator's death.

2. **SAME**—*devise construed.* A devise to "the legal and direct descendants—the heirs of their bodies begotten and their heirs—of my eldest brother \* \* \* and his wife," limits the class of devisees to the "heirs of the bodies" of the ancestors named, and, in the absence of any contrary provision, only those of that class who are living at the testator's death will take.

3. **SAME**—*devise of life estate with remainder construed.* In case of a devise to the testator's sister-in-law, "to herself during her lifetime and to heirs of her body begotten, after her death," upon the death of such sister-in-law the "heirs of her body" living at the testator's death will take, not as her heirs generally, but by virtue of the original gift to them as a class, to be ascertained when the will takes effect.

APPEAL from the Superior Court of Cook county; the Hon. A. H. CHETLAIN, Judge, presiding.

FOLLETT W. BULL, and LOUIS GROLLMAN, for the guardian *ad litem*:

The term "descendants" includes all who descend from the body of another, however remotely. 9 Am. & Eng. Ency. of Law, 399; *Bates v. Gillett*, 132 Ill. 287; 1 Rapalje & Lawrence's Law Dic. 379; Bouvier's Law Dic.; *Bryan v. Walton*, 20 Ga. 512; *Tichenor v. Brewer*, 98 Ky. 349.

Only the descendants living at the death of the testator would take under the will. 29 Am. & Eng. Ency. of Law, 410; Jarman on Wills, (6th Am. ed.) 167; *McCartney v. Osborn*, 118 Ill. 403; *Bates v. Gillett*, 132 id. 287; *Ridgway v. Underwood*, 67 id. 419.

Under a devise to descendants the distribution should be per capita. *Crossley v. Clare*, 1 Ambl. Ch. 306; 29 Am. & Eng. Ency. of Law, 420, 427; *Pitney v. Brown*, 44 Ill. 363;

2 Jarman on Wills, (6th Am. ed.) 105; *Richards v. Miller*, 62 Ill. 417; *Butler v. Stratton*, 3 Bro. Ch. 304; *Bumer v. Storm*, 1 Sandf. Ch. 357; *Stokes v. Tilly*, 9 N. J. Eq. 130; *Hoton v. Griffith*, 18 Gratt. 574.

The terms "legal and direct descendants" and "heirs of their bodies begotten and their heirs" should be construed as passing the gift to the individuals composing the class "descendants." We are not at liberty to disregard or reject as meaningless any word of the testator. *Bates v. Gillett*, 132 Ill. 287; *Jenks v. Jackson*, 127 id. 341.

The terms "issue," "heirs of the body" and "lineal descendants" have been held to be synonymous. *Brandon v. Cannon*, 1 Grant's Cas. 60; *Pearce v. Rickards*, 19 L. R. A. 472; *Wistar v. Scott*, 105 Pa. St. 200.

The words "heirs" and "heirs of the body" are sometimes construed as words of purchase. *Willett v. Ford*, 8 N. E. Rep. 917; *Allen v. Craft*, 109 Ind. 476; *Bowers v. Porter*, 4 Pick. 198; *Goodright v. White*, 2 W. Bl. 1010; *Carpenter v. VanOlinder*, 127 Ill. 42; *Butler v. Huestis*, 68 id. 594; *Belslay v. Engel*, 107 id. 182; *Summers v. Smith*, 127 id. 645; *Strain v. Sweeny*, 163 id. 603; *Griswold v. Hicks*, 132 id. 494.

Words used in one part of a will must be understood in the same sense when used elsewhere. *Jenks v. Jackson*, 127 Ill. 341; *Duryea v. Duryea*, 85 id. 41.

Title by descent is superior to title by devise or purchase. Devise is void if same estate passes as by descent. *Ellis v. Page*, 7 Cush. 163; *Kellett v. Shepard*, 139 Ill. 433; 4 Kent's Com. 506, 507.

Courts favor a construction which gives effect to every part of a will and which does not defeat the will. 29 Am. & Eng. Ency. of Law, 350; *Crerar v. Williams*, 145 Ill. 625; *Den v. Crawford*, 8 N. J. L. 97.

HAMLIN, SCOTT & LORD, (FRANK E. LORD, and GWYNN GARNETT, of counsel,) for appellee Lancaster:

In construing a devise, regard may be had to the probability or improbability of the construction claimed.

*Lang v. Pugh*, 1 Y. & C. 718; *Henry v. Thomas*, 20 N. E. Rep. 528; 1 Jarman on Wills, 453.

Punctuation in a will may be supplied or ignored when necessary for its true interpretation. *Osborn v. Farwell*, 87 Ill. 89; 11 Am. & Eng. Ency. of Law, 521; *Ewing v. Burnett*, 11 Pet. 54.

The expression "issue of the body" is not synonymous with "heirs of the body." The former expression embraces all descendants, and is applicable to them as well in the lifetime of the parent as after his death, while "heirs of the body" may embrace only a portion of the descendants, and does not embrace even them as long as the parent is living. 1 Jones on Real Prop. sec. 614.

When the devise is to heirs, whether to one's own heirs or the heirs of another, the presumption is that such heirs take according to the laws of descent,—i. e., *per stirpes*. *Daggett v. Slack*, 8 Metc. 450; *Tillinghast v. Cook*, 9 id. 143; *Kelley v. Vigas*, 112 Ill. 242; *Thomas v. Miller*, 161 id. 72; *Henry v. Thomas*, 113 Ind. 23.

This presumption will prevail even over the words "equally divided." *Balcolm v. Haynes*, 96 Mass. 204; *Bassett v. Granger*, 100 id. 348; *Hall v. Hall*, 140 id. 267; *Roome v. Counter*, 6 N. J. L. 111; *Thomas v. Miller*, 161 Ill. 73; *Kelley v. Vigas*, 112 id. 242.

WILLIAM PRESCOTT, for appellee William Wallace.

SMITH, HELMER, MOULTON & PRICE, for other appellees.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This is a proceeding in chancery by Robert H. Lancaster, one of the devisees under the will of Nimrod Lancaster, in the superior court of Cook county, to partition certain lots and tracts of land, and adjust encumbrances thereon, described in the bill, as a part of the estate of Nimrod Lancaster, deceased, late of Chicago, who died testate on June 14, 1895.

The will, which is the basis of the claim of the respective parties to the lands in controversy, was executed in July, 1890, and is as follows:

"CHICAGO, July —, 1890.

"*Know all persons by these presents*, That I, Nimrod Lancaster, of the city of Chicago, do hereby make my last will and testament, and that I am firm in body and sound in mind.

"*Item first*—I will that all my estate, both real and personal, shall be divided into four equal parts.

"*Item second*—I give and bequeath to the legal and direct descendants—the heirs of their bodies begotten and their heirs—of my eldest brother, William P. Lancaster, and his wife, Mary Lancaster, (now both deceased,) the one-fourth part of my estate so divided as above mentioned.

"*Item third*—I give and bequeath to the legal and direct descendants—the heirs of their bodies begotten and their heirs—of my brother Robert P. Lancaster, and Amanda Lancaster, his wife, (now both deceased,) the one-fourth part of my estate so divided as above mentioned.

"*Item fourth*—I give and bequeath to the heirs of their bodies begotten, and their heirs, of my sister, Sallie Wallace, and her husband, Thomas Wallace, (now both deceased,) one-fourth part of my estate so divided as above mentioned.

"*Item fifth*—I give and bequeath to my sister-in-law, Mrs. Edmonia P. Guard, (now living at Cleves, Ohio,) to herself during her lifetime and to heirs of her body begotten, after her death, one-fourth part of my estate so divided as above mentioned.

"*Item sixth*—It is my will, and I so bequeath, that my friend, William A. Barton, and his wife, Harriet Barton, shall remain in and occupy, free of rent, the house (2941 Wabash ave.) they now have, for ten years after my death.

NIMROD LANCASTER."

"*Item seventh*—I do hereby constitute and appoint Mrs. Mary Phipps, my niece, and her husband, William C. Phipps, my executors, to execute this my last will and testament.

"November 23, 1891."

The petitioner is one of the "heirs of the bodies" of Robert P. and Amanda Lancaster, designated in item 3.

Upon the hearing below there was no controversy as to the description of property sought to be partitioned, the encumbrances or the right to partition, but the con-

test arose as to the proper construction to be placed upon the second, third, fourth and fifth items of the will, and several interpretations were insisted upon in the court below by the respective parties, but one of which, as stated below, is urged here. The decree there rendered was in conformity with the prayer of petitioner as to the interpretation and construction of the will, finding, in effect, that under each clause the devisees who took the estate were the persons who, at the time of the testator's death, were the heirs, generally, of the ancestors named in the several items. From that decree this appeal is prosecuted, and the only construction here insisted upon by the appellants, different from that placed upon it by the chancellor, is, that under the language, "to the legal and direct descendants," all who have descended directly from the ancestors named in items 2, 3 and 4 take as devisees, and that the several gifts are not affected by the subsequent words, "the heirs of their bodies begotten and their heirs."

Although the rights of appellants arise under item 3 of the will, in construing the several gifts it will be sufficient for the present to give attention, first, to item 2, the language of each, except the last, being in substance the same. What is the proper construction to be given to the language of this item, "I give and bequeath to the legal and direct descendants—the heirs of their bodies begotten and their heirs—of my eldest brother, William P. Lancaster, and his wife, Mary Lancaster, (now both deceased,) the one-fourth part of my estate so divided as above mentioned?" The clause "to the legal and direct descendants," would, if standing alone, undoubtedly be interpreted as designating a large class; but it is clearly qualified by the language which follows: "The heirs of their bodies begotten and their heirs." This latter clause is a parenthetical expression, and is to be understood as explaining or qualifying the clause immediately preceding. Interpreted as such parenthetical clauses are gen-



erally understood, the sentence would read as though it had been written, "I give and bequeath to the legal and direct descendants,—that is to say, the heirs of their bodies and their heirs,—of my eldest brother, William P. Lancaster, and his wife," etc. This construction is made without adding to the language employed, but by simply setting out in words what is actually expressed by the grammatical construction and punctuation of the sentence. Nor does it result in rejecting the first clause, as claimed by appellants, but it gives effect to both clauses. "The heirs of their bodies" are, in fact, "legal and direct descendants," but it cannot be said that all the "legal and direct descendants" are "heirs of their bodies." The interpretation insisted upon by appellants would necessarily reject the second clause, and violate the well known general rule of construction which requires the giving effect to every part of a written instrument in its interpretation, if it can be done.

The next consideration is, who, under the foregoing construction, shall take under item 2 of the will? Manifestly, only those who, singly or as a class, come within the description of "heirs of the bodies" of the ancestors named. Being a simple devise to a class, and the will not expressly or by necessary implication fixing a time when the devisees are to be ascertained or when the division is to be made, the law will fix it at the testator's death, that being the time when the will first speaks. (*McCartney v. Osburn*, 118 Ill. 403. See, also, *Kellett v. Shepard*, 139 id. 433.) From the evidence in the record we find the only person living at the testator's death who comes within the description "heirs of the bodies" of William P. and Mary Lancaster, to be the defendant John E. Lancaster, the son. The decree below, however, divides the part of the estate mentioned in that item into two parts, giving one to John E. Lancaster and the other to the heirs, generally, of his deceased sister, Mrs. Jane Grubbs, they being the only children of the ancestors mentioned;

and it is contended by appellee that the estate should be divided, according to the Statute of Descent, among the heirs, generally, of the ancestors mentioned in the several items. The position cannot be sustained. Jane Grubbs was living at the time of the making of the will but not at the date of the testator's death, and was therefore not in being at the time the estate vested. Had the devise been to Jane Grubbs and John E. Lancaster, specifically, as "the heirs of the bodies" of the ancestors, then the share of Mrs. Grubbs, she being dead at the time of the vesting of the estate, would have lapsed, and her heirs generally, even in that case, could not have taken. The devise here being to a class, the death of one of them before the testator will not cause a lapse of any part of the gift, "but those of the described class who survive the testator will take the whole." (Am. & Eng. Ency. of Law, 13,—1st ed.—33, and cases cited.) John E. Lancaster is the sole person coming within the designated class, and the children and grandchildren of Mrs. Grubbs can by no proper construction of the will be included therein.

It is unnecessary to enter into a discussion of items 3 and 4 of the will, as the language of each is the same as in item 2, and the same rules of construction and interpretation necessarily apply. Item 5 is unlike the others, but it is a direct gift for life to Mrs. Edmonia P. Guard, with remainder to the class named in that devise. (See Hurd's Stat. 1897, sec. 6, p. 391.) The life estate being at an end, Mrs. Guard having died, the "heirs of her body" living at the death of the testator take that part of the estate, and take it not as her heirs generally, but by virtue of the original gift to them as a class, to be ascertained when the will should take effect.

For the error indicated the decree below will be reversed and the cause remanded, with direction to the superior court to make partition of the lands in conformity with the views herein expressed.

*Reversed and remanded.*

THE PEOPLE *ex rel.* Nathaniel Buzzell*v.*

JAMES WHIPPLE.

*Opinion filed October 19, 1900.*

1. HIGHWAYS—one regular division into road districts exhausts the power. The power of highway commissioners, town clerk and supervisor to divide a township into road districts, under section 16 of the Township Organization act, as amended in 1895, (Laws of 1895, p. 318,) is not a continuing one, but being once regularly exercised is exhausted, and the authorities cannot act again by way of changing the first division.

2. SAME—what not an irregular exercise of power to form road districts. The power to divide a township into road districts is not irregularly exercised because, in making the division, two of the highway commissioners are left to reside in one district, since the purpose of section 16 of the Township Organization act, that one commissioner shall reside in each district, is to be accomplished when vacancies occur.

*Whipple v. People ex rel.* 87 Ill. App. 145, reversed.

APPEAL from the Appellate Court for the Second District;—heard in that court on writ of error to the Circuit Court of DeKalb county; the Hon. CHARLES D. BISHOP, Judge, presiding.

HENRY S. EARLEY, State's Attorney, (CARNES & DUNTON, of counsel,) for appellant:

The authority of the public officer must be limited in its exercise to that term during which he is by law invested with the rights and duties of the office. It follows, therefore, that he can, in general, exercise no authority before his term begins or after his term has terminated. The same principle applies as well where the officer is only chosen for the performance of a single act as when he is chosen for a definite term. When chosen to act in reference to a particular subject his powers exhaust themselves in the acting, and having once acted he is henceforth *functus officio*, and can neither act again in reference to the same subject matter nor undo what he has

done. Mechem on Public Offices and Officers, sec. 509; *State v. Donnewirth*, 21 Ohio St. 216; *Attorney General v. Iron County Canvassers*, 64 Mich. 607.

A special statutory power must be exercised as it is given and in conformity with the statute conferring it. 19 Am. & Eng. Ency. of Law, 457.

Where a duty imposed upon a body or officer by law has been discharged and completed the power is exhausted, and the execution of the power is no longer subject to the supervision or review or change by the officer to whom it was entrusted. 19 Am. & Eng. Ency. of Law, pp. 458, 459; *Northampton County v. Yohe*, 24 Pa. St. 305; *Godschalk v. Northampton County*, 71 id. 324; *Northumberland County v. Bloom*, 3 W. & S. 542; *People v. Caledonia*, 16 Mich. 63; *State v. King*, 4 Dev. & B. 521; *People v. Wayne County*, 41 Mich. 4.

GEORGE BROWN, and CLIFFE & CLIFFE, for appellee:

A statute directing the mode of proceeding by public officers is to be deemed directory, and a compliance is not deemed essential to the validity of the proceeding unless so declared by statute. *People v. Cook*, 8 N. Y. 67.

When a statute specifies the time within which a public officer is to perform an act regarding the rights and duties of others it will be considered as directory, merely, unless the nature of the act to be performed or the language of the statute shows that the designation of the time was intended as a limitation of power. *Jackson v. Young*, 5 Cow. 269; *People v. Allen*, 6 Wend. 487.

Where a statute gives directions, not of the essence of the thing to be done but intended merely to promote promptness and order, they are commonly to be regarded as directory, merely; and the act, if performed, although not in the time or not in the mode indicated, may be regarded as sufficient if no rights are prejudiced and the substantial purpose of the statute is accomplished. *Farwell v. Cohen*, 138 Ill. 216; *Kinney v. People*, 52 Ill. App. 359.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This is a proceeding in the nature of a *quo warranto*, begun by the State's attorney upon the relation of Nathaniel Buzzell, against James Whipple, in the circuit court of DeKalb county, to contest his title to the office of commissioner of highways of the township of Sycamore, in that county. A hearing of the cause resulted against Whipple and judgment of ouster was entered against him. Upon error prosecuted to the Appellate Court for the Second District that judgment was reversed, and the People, as plaintiff in error, now prosecute a writ of error to this court.

The only question in the case is as to the legal effect of certain proceedings had by the commissioners of highways, the town clerk and the supervisor of the town of Sycamore on January 23, 1896, whereby the township was attempted to be divided into road commissioners' districts, under an amendment to section 16 of chapter 139 of our statutes. (Hurd's Stat. 1897, p. 1592.) The section in question, after providing for the election of commissioners of highways, provides that "it shall be the duty of the commissioners of highways, together with the town clerk and supervisor, to meet within ten days after the next town meeting after the passage of this act in each town and divide each township into three districts, to be known as road commissioners' districts numbers 1, 2 and 3, dividing the township as near into three equal divisions as possible, taking into consideration extent of territory and population in making and forming boundaries of such districts and a plat of each district to be filed in the office of the town clerk of said town. The purpose of such division is to have the different portions of each township represented by a commissioner of highways who is a resident of such district, and when a vacancy occurs such vacancy shall be filled either by election or appointment, as the case may be, by a resident of said district where such vacancy occurs."

It appears from the evidence introduced upon the hearing, that a meeting was held on April 14, 1896, and a division of the township then made by the proper town officers, being within ten days after the first annual town meeting subsequent to the taking effect of said amended section of the statute, and that a map or plat of the town as districted was made and filed in the office of the town clerk. By that division a district was taken off of the west side of the township and numbered one. Two other districts were then made by dividing the remainder of the township into two equal parts by a line running east and west, the north half being numbered two and the south half three. By this division the respondent, Whipple, resided in district No. 1, as did also Mr. Swanson, another commissioner. This action of the board, so far as we are able to discover, was in all things regular and in conformity with the provisions of the statute. Subsequently, on January 23, 1897, the said town officers held a second meeting, at which they proceeded to again divide the town into road districts, disregarding the first division. This division was made by drawing two lines east and west through the township, making the divisions of equal width, numbering the north division one, the middle two and the south division three. Mr. Whipple resided in district No. 1 of the new division, and his term of office expired in April, 1897. At that time he was re-elected for a term of three years. It is conceded he was legally elected provided the second division of the township was legal and binding. But on behalf of the People it is contended that the action of the commissioners of highways, the town clerk and supervisor, had at the first meeting, was in all respects legal and binding and exhausted their power and authority on the subject, and as a consequence the action of the same parties on January 23, 1897, was without legal authority and therefore void. It is admitted that if this position be correct then defendant in error was not legally elected

in 1897, for the reason that there was no vacancy in the district where he resided according to the first division, the term of the other highway commissioner residing in that district not having expired. On the other hand, it is urged by counsel for Whipple that the first division was void because not made in accordance with the provisions of the statute as to "taking into consideration extent of territory and population in making and forming boundaries of such districts," and did not answer the purpose of the statute as declared therein, that is, "to have the different portions of each township represented by a commissioner of highways who is a resident of such district;" and this being so, it is said the town officers had the power, and it was their duty, to make a new division.

We do not think the statute conferred upon the town officers the power to make more than one division. It must be borne in mind that no continuing power was vested in this board by the amended act. If the legislature had intended, as seems to be thought, that the territory of the township could be changed from time to time, they would undoubtedly have vested that power either in the body named in the act or some other authority. The act imposed upon these officers, as a special commission, the duty of dividing the township, this duty to be performed within a certain time therein specified. These officers on April 14, 1896, within the time prescribed, undertook to perform that duty. Being chosen to act in reference to this particular subject their powers exhausted themselves in the act, and having once acted they could not act again by way of reviewing their former action nor undo what they had already done. (Mechem on Public Offices and Officers, sec. 509.) "Where a duty imposed upon a body or officer by law has been discharged and completed the power is exhausted, and the execution of the power is no longer subject to the supervision or review or change by the officer to whom it was intrusted."

(19 Am. & Eng. Ency. of Law, p. 459, and cases cited.) Whether the first division was a wise and proper one or not was not within the province of the town officers to afterwards determine. Had the first exercise of that power for any reason been absolutely void, the officers afterwards could have made a division of the township, for the reason that in such case the duty imposed would not have been exercised at all. But, as before said, there is nothing in this case to show that the power to make the division of the township had not been regularly exercised on April 14, 1896. The only reason here given for making the second division is that it divides the township more nearly into three equal divisions, taking into consideration the extent of territory and population, than did the first,—that is to say, the town officers changed their minds upon that subject and undertook to review their former action. If they could do so on the 23d of the following January, why could they not continue to do so from time to time, as they might conclude their former action was not proper? The contention that this view will result in preventing the commissioners from re-districting the township for all time to come cannot prevail against the well settled rule of law, as here shown. Furthermore, there is no more apparent reason for saying that the boundaries of these districts should be changed repeatedly than there would be for saying that the boundaries of the townships themselves should be changed from time to time. Townships and road districts, when once divided, are not so subject to change of their highways as to make it necessary that the districts should be changed. Anyhow, we regard the rule of law as above announced founded in reason and sustained by authority, and it can not be disregarded by the courts simply because it might be thought, in a particular case, to be less wise or convenient than some other construction.

The suggestion that the power was irregularly exercised in the making of the first division because two of



the commissioners resided in the first district is without force. The act itself shows such a result was contemplated by the legislature. The districts were not to be made for the accommodation of the highway commissioners then in office, so that each might have a district in which his own residence was located, as seems to be contended by counsel, but the board, in the performance of the duty of making the division, was to be controlled by the consideration of equality of territory and population. The purpose of the act that a commissioner should reside in each one of the districts is to be accomplished when vacancies occur.

The division of the township made on April 14, 1896, was legal, and the attempted second division was therefore void. The judgment of ouster entered against Whipple in the circuit court was correct and will be affirmed, and the judgment of the Appellate Court will be reversed.

*Judgment reversed.*

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THE CAMPBELL & ZELL COMPANY

v.

MAHALA ROSS.

*Opinion filed October 19, 1900—Rehearing denied December 6, 1900.*

**ATTACHMENT**—*what must be shown to entitle plaintiff to question good faith of transfer set up by interplea.* The good faith of a transfer of stock alleged by interplea in attachment to have been for a valuable consideration and with notice to the attachment plaintiff, cannot be attacked by the latter until he has established the relation of debtor and creditor between himself and the attachment defendant.

*Campbell & Zell Co. v. Ross*, 86 Ill. App. 356, affirmed.

**APPEAL** from the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. GEORGE H. TRUDE, Judge, presiding.

JOHN REID MCFEE, for appellant.

JAMES S. CUMMINS, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

The Branch Appellate Court affirmed a judgment of the superior court of Cook county, by which it was adjudged, upon the appellee's interplea in an attachment brought by the appellant against one William A. Ross, that the shares of stock attached were the property of appellee and not of the defendant in the attachment. All questions of fact have by the judgment of the Appellate Court been conclusively settled adversely to the appellant, and we cannot reverse the judgment unless a question of law is presented by the record for our consideration which was decided erroneously below.

The issue made upon appellee's interplea was tried by the court without a jury. The appellant presented to the trial court ten propositions to be held as law in the decision of the case, but the court refused each and all of them. No propositions were held or presented on behalf of appellee. The interplea alleged that the stock was the property of appellee by assignment and delivery to her for a valuable consideration, and that the plaintiff had notice thereof before the attachment. The plaintiff, in its replication, denied that the stock was the property of appellee and denied that the alleged assignment was made in good faith. There was evidence tending to prove the allegations of the interplea, and evidence on the part of the plaintiff in the attachment tending to prove the allegations of its replication. In other words, there was a conflict as to the *bona fides* of the transfer. The propositions which the plaintiff requested the trial court to hold as law in the decision of the case were mainly directed to the question of good faith of the transaction. But we have held that before a plaintiff in the attachment, upon an issue of this character, can question the

good faith of the transfer under which the claimant claims title, he must prove that the relation of debtor and creditor existed between the defendant and himself,—in other words, must prove that the defendant was indebted to him,—(*Yost Manf. Co. v. Alton*, 168 Ill. 564; *Springer v. Bigford*, 160 id. 495;) otherwise he would not be injured by a fraudulent transfer and could not therefore be heard to question that it was made in good faith. Now, in the propositions asked by appellant this question was wholly ignored, and it was assumed that the plaintiff had the legal right to question the good faith of the assignment of the stock to appellee, whether it had shown itself to be a creditor of the defendant or not, or else it was assumed that that relation had been proved,—and appellant contends here that there *was* sufficient proof upon that question. Whether there was or not was a question of fact for the Appellate Court, and no question of law as to the legal sufficiency of the proof in that regard has been presented by the record or is presented here in any way except by the argument of counsel. It might have been presented by propositions of law, but was not. Some of the propositions were erroneous in other respects, but as the omission mentioned was common to all, a sufficient reason appears for their refusal by the trial court.

Whether, upon the evidence reviewed by counsel, judgment should have been for the plaintiff in the attachment instead of for the claimant was a question finally settled in the Appellate Court. We have no power to review it.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

W. SCOTT MARSHALL, Admr.

v.

MARIETTA E. COLEMAN *et al.**Opinion filed October 19, 1900—Rehearing denied December 7, 1900.*

1. **EXECUTORS AND ADMINISTRATORS**—*correctness of annual report may be attacked on final report.* Upon the presentation of an administrator's final report in answer to a citation, the court may hear testimony for the purpose of contradicting and surcharging the former reports and accounts of the administrator, and may correct such reports if the evidence warrants.

2. **SAME**—*county court may compel administrator to render a just account.* If an administrator, through bad faith or the failure to exercise reasonable diligence, diminishes the funds in his hands for distribution, he may be required to render a just and true account by the county court in the exercise of its equitable powers.

3. **SAME**—*when administrator must interpose Statute of Limitations.* An administrator should interpose Statute of Limitations against a claim composed of barred items, particularly if the claim is not otherwise justly due or well founded.

4. **SAME**—*when the administrator should not allow claim for care and maintenance.* A claim for ten years' care and maintenance of the deceased, purporting to be presented by his grandmother, should not be allowed by the administrator, where the grandfather of the deceased, who was living during such period, furnished the home to the deceased, and there is no evidence to overcome the presumption that such home was extended gratuitously.

5. **EVIDENCE**—*advancements must be evidenced in writing.* Under section 7 of the Statute of Descent no gift or grant shall be deemed to have been made as an advancement unless it is expressed or charged in writing by the donor as an advancement or acknowledged in writing by the donee.

6. **SAME**—*proof of loss of instrument is unavailing without secondary evidence.* Proof of the loss of a written instrument alleged to show an advancement is unavailing without secondary proof of the contents of such instrument.

7. **SAME**—*rule as to admissibility of book accounts applies to books of deceased person.* The rule that book accounts are only admissible in favor of the party who keeps them when the entries are made contemporaneously with the transactions recorded, applies to the books and entries of a deceased person.

8. **MAXIMS**—*maxim ignorantia legis neminem excusat does not apply to laws of foreign States.* Ignorance of the law such as will not excuse

187	556
96a	*486

187	557
194	9 48
194	9 50
100a	1 78

187	556
201	*183

187	556
208	*490
204	*485

187	556
209	99
112a	506

is ignorance of the laws of one's own State, but not the laws of a foreign country or State.

9. **FIDUCIARY RELATIONS**—*advantage gained by abuse of fiduciary relation cannot stand.* An advantage gained at the expense of the confiding party by an abuse of a fiduciary or confidential relation will not be permitted to stand, even though the transaction could not be impeached but for the existence of such relation.

10. **INTEREST**—*when administrator may be charged with ten per cent interest.* Under section 114 of the Administration act an administrator is chargeable with ten per cent annual interest on moneys, notes, bonds and credits in his possession and control as assets of the estate, after a period of two years and six months from the date of his letters, unless good cause is shown why the same should not be charged.

11. **APPEALS AND ERRORS**—*effect of appeal by administrator from order rejecting one item.* An appeal by an administrator from an order or judgment disallowing one of his claims against the estate only brings up for review the ruling in respect to that particular claim, and the allowance of other claims cannot be questioned by the assignment of cross-errors.

12. **SAME**—*when rule as to effect of separate appeal by administrator does not apply.* If a part of a single claim by an administrator is allowed and part rejected, the fact that the administrator appeals only from the order disallowing such part does not preclude the assignment of cross-error upon the allowance of the other part.

13. **COSTS**—*when administrator is properly required to pay costs.* It is proper for the court to tax the costs of a proceeding against the administrator personally, if such costs are incurred as a result of his own misconduct.

*Marshall v. Coleman*, 89 Ill. App. 41, affirmed in part.

**APPEAL** from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Marion county; the Hon. TRUMAN E. AMES, Judge, presiding.

The appellant, W. Scott Marshall, administrator of the estate of Edward B. Goodner, deceased, filed on January 5, 1897, in the county court of Marion county his final report as administrator in compliance with an order of the probate court, made on a citation issued at the instance of the appellee, Marietta E. Coleman. This final report was of his acts and doings as such administrator

from August 24, 1892, to January 5, 1897, and was a summary of former reports made by him as administrator, the first report having been filed on September 19, 1894, being of his acts and doings as such administrator from December 1, 1892, to September 14, 1894; the second annual report having been filed on February 26, 1895, and being of his acts and doings as administrator from September 14, 1894, to February 25, 1895; the third report having been filed on September 2, 1895, and being of his acts and doings as such administrator from the date of his second report to August 31, 1895; the fourth annual report having been filed on October 3, 1896, and being of his acts and doings as such administrator from the date of his third report to October 3, 1896; and the fifth report, being the report so as aforesaid made on January 5, 1897, as a final report in answer to the citation issued as aforesaid. Orders were entered by the county court, approving the first four reports above mentioned at or about the respective dates at which they were filed. Exceptions were filed in January, 1897, to certain items in the first, third and fifth reports of the appellant, as such administrator, by the appellees, as heirs of the intestate, Edward B. Goodner, deceased. These exceptions charge neglect, fraud and collusion on the part of the appellant, as administrator, in the allowance of the claims specified in said items as being unjust and illegal claims, the exceptions charging not only that each of said claims was unjust, illegal and invalid, but that it was barred by the Statute of Limitations at the time of its presentation against the estate; and that said claims were allowed by the appellant as administrator without honestly interposing legal defenses thereto, and by his collusion.

On April 8, 1897, after hearing had and testimony heard, the county court entered a judgment, sustaining the exceptions in part, disallowing the sum of \$1560.00 paid by appellant upon the claim of Harriet E. Marshall, and ordering appellant to reform his final report

by charging himself with \$1560.00 and interest for two years thereon at five per cent from February 1, 1893; also disallowing the amount paid or refunded by appellant, as administrator of the estate of Edward B. Goodner, deceased, to-wit, the sum of \$3500.00 paid to James E. Marshall, administrator of the estate of Edward B. Marshall, deceased, the amount so refunded having been the one-half of an alleged advancement of \$7000.00 claimed by appellant to have been made by the said Edward B. Marshall in his lifetime to his daughter, Melvina Goodner, since deceased, and in her lifetime the wife of Dr. Lyman T. Goodner, said Melvina Goodner being the mother of the deceased, Edward B. Goodner, and charging appellant as such administrator with said sum of \$3500.00 and interest for two years at five per cent; also charging appellant with \$56.00 allowed to him on his claim for medical services; also setting aside the claim of Charles P. Marshall in part, and charging appellant as administrator with \$168.00 thereof; ordering that appellant, the administrator, be allowed \$75.74 additional fees, and disallowing his claim of \$53.23 (or \$52.27) for his cash outlay, making in all the sum of \$5954.72; and directing distribution of the effects in kind as noted in the report.

From the judgment so entered by the county court appeal was taken by the appellant, W. Scott Marshall, administrator, to the circuit court of Marion county. On April 28, 1897, the final report, together with the other reports of the appellant as administrator, and the exceptions of the appellees above named, were filed in the circuit court. A hearing was had *de novo* in the circuit court, and on May 12, 1898, a decree or judgment was entered by the circuit court, finding that the exceptions to the final report of the appellant as administrator were in the main sustained by the evidence, and should be allowed as therein specified; that appellant had, by negligence and collusion, failed to interpose legal and statutory defenses in the allowance of claims against the

estate, and had failed without sufficient cause to make final settlement of said estate within the period required by statute; and finding that appellant should be charged with the following claims or parts of claims, with proper interest, as follows: \$1560.00 of the claim of Harriet E. Marshall with ten per cent interest for three years and two months, a total of \$2054.00; \$168.00 of the claim of Charles P. Marshall with ten per cent interest for three years and two months, a total of \$221.20; \$14.88 of the claim of expense of administration; \$1750.00 of the claim of J. E. Marshall, administrator of the estate of E. B. Marshall, deceased, with ten per cent interest for two years, seven months and twenty-seven days, in favor of the plaintiff, Nellie May Goodner, a total of \$2215.18; and, thereupon, it was ordered and decreed therein that the appellant, as administrator of the estate of Edward B. Goodner, deceased, should be charged with \$26.24 reported by him as on hand in his final report, and that his account should be surcharged with the items last above named, and that the said appellant should reform his final account, as administrator as aforesaid, in the manner above set forth, charging himself with the above named sums of \$26.24, \$221.20, \$14.88, \$2054.00, and \$2215.18, deducting from the latter amount six per cent commissions on \$1750.00, leaving \$2110.18; and making the whole amount charged against appellant \$4426.50. The decree or judgment directed that, of this amount, he should pay to Marietta E. Coleman \$1158.16, and to Nellie May Goodner \$3268.34. It was also therein ordered, that the costs of the proceeding, including the costs of the probate court, should be paid by the administrator from his personal funds. Appellant excepted to the decree and all its findings and prayed an appeal to the Appellate Court.

Upon appeal to the Appellate Court the Appellate Court rendered a judgment as follows, to-wit: that "the decree of the circuit court, requiring appellant to surcharge himself with \$1560.00 of the item of the claim of



Harriet E. Marshall with ten per cent interest, is affirmed; and the decree, requiring him to surcharge himself with \$14.88 of appellant's claim for expenses, is also affirmed; the decree, requiring appellant to surcharge himself with \$168.00 of the claim of Charles P. Marshall, is reversed; the decree, requiring appellant to surcharge himself with \$1750.00, and ten per cent interest, of the \$3500.00 item, and that Mrs. Coleman is estopped from any claim to said item, is affirmed; the decree, charging appellant with costs to be paid out of his private funds, is affirmed; three-fourths of the costs in this (Appellate) court will be taxed to appellant and one-fourth to appellees; and the cause is remanded to the circuit court with instructions to enter a decree in accordance with the views herein expressed."

The present appeal is prosecuted from the judgment, so as above entered by the Appellate Court.

Edward B. Marshall was a physician and banker, who lived for many years before his death in Centralia, Illinois. He died intestate at that place on April 17, 1890, leaving an estate of more than \$124,000.00. He left, him surviving, his widow, Harriet E. Marshall and four sons, to-wit: W. Scott Marshall, James E. Marshall, Xenophon S. Marshall and Charles P. Marshall, and two grandchildren, the children of a deceased daughter, Melvina E. Goodner, wife of Dr. Lyman T. Goodner, said grandchildren being Marietta E. Goodner, now Marietta E. Coleman, wife of Carlton M. Coleman of Colorado, and Edward B. Goodner. Mrs. Melvina E. Goodner died before her father, Dr. E. B. Marshall, died, and left, her surviving, her husband, Dr. Lyman T. Goodner, and two children, the said Edward B. Goodner, and Marietta E. Goodner above named. Dr. Lyman T. Goodner, after the death of his wife, Melvina E. Goodner, and on August 24, 1876, married one Helen L. Chapman, thereafter Helen L. Goodner. Dr. Lyman T. Goodner in his lifetime lived at Nashville in Washington county, Illinois. By his second wife,

Helen L. Goodner, he had a child, to-wit, the appellee, Nellie May Goodner, born on August 2, 1878. Dr. Lyman T. Goodner died on March 20, 1880, leaving no estate. After the death of their father, Lyman T. Goodner, the two children, Edward B. Goodner and Marietta E. Goodner, ceased to live with their step-mother, Helen L. Goodner, at Nashville, and went to Centralia to live with their grandfather, Edward B. Marshall, the father of their deceased mother. There is some testimony, going to show that Marietta E. Goodner went to live with her grandfather before his death, to-wit, in 1878. Marietta E. Goodner, from 1878 or 1880, and Edward B. Goodner, from 1880 up to the time of his grandfather's death in 1890, lived with their grandfather in Centralia. The two grandchildren were brought up or raised by their grandfather in his family, and as members of his family.

After the death of Dr. Edward B. Marshall, his son, James E. Marshall, was appointed administrator of his estate. Charles P. Marshall was appointed guardian of his nephew, Edward B. Goodner.

Edward B. Goodner died intestate on April 15, 1892, being then unmarried, and a minor a little over nineteen years of age, and leaving no children, but leaving, as his only heirs-at-law, his sister of the whole blood, Marietta E. Goodner, afterwards Marietta E. Coleman, one of the appellees herein, and his sister of the half blood, Nellie May Goodner, the other of the appellees herein. On August 24, 1892, the appellant, W. Scott Marshall, the uncle of Edward B. Goodner, filed a petition in the county court of Marion county, asking that he be appointed administrator of the estate of his nephew, Edward B. Goodner, deceased; and in said petition stated that Edward B. Goodner had died seized and possessed of real and personal property consisting solely of a distributive share in the estate of E. B. Marshall, deceased, and also stating that said Edward B. Goodner left him surviving his sister, Marietta E. Goodner, as his heir, but saying noth-

ing about his half-sister, Nellie May Goodner. The appellant, W. Scott Marshall, was, in accordance with the prayer of his petition, appointed administrator of the estate of Edward B. Goodner, deceased, on August 24, 1892.

Xenophon S. Marshall, one of the sons of Dr. E. B. Marshall, died after the death of his father, and also after the death of his nephew, Edward B. Goodner, to-wit, in 1893, and left him surviving no widow or child or children or the descendants of any child or children. No administration was ever taken out upon his estate. Nellie May Goodner was born August 2, 1878, and consequently became of age on August 2, 1896.

On June 20, 1892, two months before the appellant was appointed administrator of the estate of Edward B. Goodner, deceased, James E. Marshall, then cashier of the bank in Centralia, of which his brother, the appellant, W. Scott Marshall, was the president, made out a claim, in favor of his mother, Mrs. Harriet E. Marshall, the widow of Dr. E. B. Marshall, against the estate of his nephew, Edward B. Goodner, for \$1926.85, consisting of two items, to-wit: "To care and maintenance from April 17, 1880, to April 17, 1890, of Edward B. Goodner, 520 weeks at \$3.00 per week, \$1560.00; to care and maintenance from April 17, 1890, to February 2, 1892, of Edward B. Goodner, 91 weeks and five days, at \$4.00 per week, \$366.85." This claim, as appears from an affidavit thereto annexed, was sworn to by Harriet E. Marshall on June 20, 1892, before her son, James E. Marshall, as notary public. This claim was filed against the estate of Edward B. Goodner on January 3, 1893; and there appears among the papers of the estate the following document, signed by W. Scott Marshall as administrator of E. B. Goodner's estate, to-wit: "And now comes W. Scott Marshall, administrator of the within named estate, and enters his appearance and waives issuing of process as to this claim, without objection to its allowance." The claim was marked "allowed" by the appellant, as admin-

istrator. On January 3, 1893, a claim for \$298.00 in favor of Charles P. Marshall against the estate of his deceased nephew, Edward B. Goodner, was filed in said county court, consisting of five items dated in 1886, 1887, 1888, 1889 and 1890 for medical services, claimed to have been rendered to Edward B. Goodner, deceased, in his lifetime and in those years. This claim was sworn to, as appears from the annexed affidavit, by Charles P. Marshall, and was allowed by W. Scott Marshall, administrator.

After the death of her grandfather, Dr. E. B. Marshall, on April 17, 1890, the appellee, Marietta E. Coleman, then Marietta E. Goodner, lived in the family of her grandmother, Harriet E. Marshall, up to some time in 1893 or 1894, when she went to Colorado on account of her health. She went to Colorado on June 6, 1894, and lived at Monument in that State. While there she married Carlton M. Coleman, who was then a resident of Colorado.

At the July term, 1895, of the county court of Marion county and about July 1, 1895, James E. Marshall, as administrator of the estate of his deceased father, Edward B. Marshall, deceased, filed a petition in said county court, stating that as administrator he had received \$124,787.25, and had paid out for funeral expenses and other indebtedness \$12,764.28, stating the names of the heirs left by E. B. Marshall, the marriage of his daughter, Melvina, with Lyman T. Goodner, and that Edward B. Marshall made large advancements in money and other property for the support and comfort of Melvina E. Goodner and her husband, amounting to the sum of \$7000.00; also stating the death of Edward B. Goodner, intestate, "leaving no widow, child or children, or any descendants of a child or children, but leaving Marietta E. Coleman, *nee* Goodner, his only sister, and no brothers him surviving;" also stating the appointment of appellant, W. Scott Marshall, as administrator of Edward B. Goodner's estate, and that he was not as yet able to make final report and be dis-

charged. This petition also stated that James E. Marshall, as administrator of Edward B. Marshall's estate, from time to time made distribution to the widow and heirs of his father's estate, and in so distributing had by "mistake and inadvertence" paid to Marietta E. Coleman (formerly Goodner) and to the said Edward B. Goodner before his death, and since his death to his administrator, each the sum of \$3500.00 more than in law they were entitled to out of the assets of said E. B. Marshall's estate. The petition represented, that Marietta E. Coleman had refunded to the petitioner the sum of \$3500.00, so paid to her by mistake and inadvertence, but that W. Scott Marshall, administrator as aforesaid, refused to pay back and refund to the petitioner the said sum of \$3500.00, so paid to Edward B. Goodner and to his administrator; and the petition prayed for an order, requiring and directing the appellant, as administrator of said Edward B. Goodner's estate, to refund and pay back to petitioner, James E. Marshall, the sum of \$3500.00 above mentioned out of the assets received by him from petitioner.

With this petition was filed a document, dated June 25, 1895, signed by Marietta E. Coleman, in the body of which she is described as "sole heir-at-law of the estate of Edward B. Goodner, deceased," and thereby consents that the said W. Scott Marshall, administrator of the estate of Edward B. Goodner, should pay back to James E. Marshall, as administrator of the estate of Edward B. Marshall, the sum of \$3500.00, alleged to be an amount paid to the estate of Edward B. Goodner by said James E. Marshall, as administrator of the estate of Edward B. Marshall, deceased, through inadvertence and mistake.

A document, dated January 14, 1895, was drawn up and signed in Marion county by Charles P. Marshall, W. Scott Marshall and James E. Marshall, and was then forwarded to Colorado to Marietta E. Coleman, who signed the same under the signatures of her three uncles on or about January 25, 1895, and returned the same to

her uncle, Charles P. Marshall, at Centralia. By this document, dated January 14, 1895, the signers thereof, calling themselves the only surviving heirs-at-law of Edward B. Marshall, deceased, recognized and admitted the advancement to Melvina E. Goodner and to her husband, Lyman T. Goodner, "as advancement to them, and that the same was received by them during their lives as advancement, and by them was acknowledged and received from year to year from May 1, 1866, up to October 1, 1878, amounting to the sum of \$7000.00, which sum was as such advancement understood and agreed should be deducted from the distributive share of said Melvina E. Goodner out of the estate of her father, E. B. Marshall, at his death, and the distribution of his estate among his said children and grandchildren." This last named document was also filed in the county court of Marion county.

In May or June, 1895, Marietta E. Coleman, and her husband, Carlton M. Coleman, came on from Colorado to Centralia in response to a letter written to Mrs. Coleman by her uncle, Charles P. Marshall, on April 30, 1895, in which he stated to her that the heirs to the real estate of E. B. Marshall, deceased, were contemplating a partition or division of the same, and asking her whether she wished to settle the matters in a court of law or to make an offer to sell her share in said estate for cash, and closing with these words: "We will entertain an offer of sale from you if made within fifteen days." Upon their arrival in Centralia and on June 5, 1895, Mrs. Coleman and her husband and her three uncles, James E. Marshall, W. Scott Marshall and Charles P. Marshall, signed a certain agreement, reciting that she and her husband that day sold, by three quit-claim deeds of that date, to her three uncles all their interest in the real estate, of which Edward B. Marshall died seized, for \$3700.00. It is also stated in said document, dated June 5, 1895, that the advancement of \$7000.00 above mentioned was made by

E. B. Marshall in his lifetime to his daughter, Melvina E. Goodner, and that by mistake and inadvertence James E. Marshall, as administrator of the estate of Edward B. Marshall, deceased, had paid to Mrs. Coleman \$3500.00, half of said advancement, and also had paid by inadvertence and mistake the other half thereof to W. Scott Marshall, the administrator of the estate of Edward B. Goodner, deceased, being \$3500.00; and the agreement recites that the refunding of said advancement is to be a part of the consideration of the purchase of said real estate, and states the manner in which it is to be refunded. The agreement also contains certain provisions as to what is to be done in case any contest shall arise over the validity of said advancement.

On July 1, 1895, in the matter of the estate of E. B. Goodner, deceased, an order was entered reciting as follows: "Comes J. E. Marshall, administrator of the estate of E. B. Marshall, deceased, \* \* \* and files his petition praying for an order on W. Scott Marshall, administrator aforesaid, to refund to the petitioner the sum of \$3500.00, heretofore distributed and paid over to him for the benefit of the heirs of E. B. Goodner, deceased; and the court being now sufficiently advised in the premises orders that the prayer of the petitioner be granted." Said sum of \$3500.00 was accordingly paid over by the appellant, as administrator, to his brother, James E. Marshall, as administrator, in accordance with said order.

W. F. BUNDY, for appellant.

G. A. HOFF, ALONZO HOFF, and CHARLES T. MOORE,  
for appellees.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

*First*—The appellees in this case attack certain items in the final report of appellant, as administrator of the estate of their deceased brother, Edward B. Goodner.

These items represent moneys, paid out by the appellant as such administrator upon certain claims filed against the estate. It is charged, that these claims were improperly allowed by the appellant as such administrator, and that he was guilty of fraud and collusion in so allowing the same, and neglected his duty in not presenting proper defenses thereto. The two main items, contested by the appellees, are \$1560.00, with interest thereon, paid upon a claim filed by Harriet E. Marshall, mother of appellant and grandmother of appellee, Marietta E. Coleman; and \$3500.00, refunded by the appellant out of the moneys of the estate of Edward B. Goodner, deceased, to appellant's brother, James E. Marshall, administrator of the estate of Edward B. Marshall, deceased, father of appellant and grandfather of appellee, Marietta E. Coleman, being the half of an advancement of \$7000.00, alleged to have been made by Edward B. Marshall, deceased, in his lifetime to his daughter, Melvina E. Goodner, and her husband, Lyman T. Goodner, sister and brother-in-law of the appellant, and mother and father of the appellee, Marietta E. Coleman. The contest here is not between the holders of these claims, or of the judgments entered by the county court allowing these claims, on the one side, and the administrator of the estate of Edward B. Goodner, deceased, on the other. The contest here arises out of exceptions, made to the final report of the appellant, as administrator, by the appellees, as heirs of the estate of Edward B. Goodner, deceased. The claims objected to were allowed by the county court originally; and it is claimed by the appellant that, having been allowed, they were judgments entered in regular form, and cannot be attacked in the county court through exceptions to the final report made to that court.

When the exceptions were filed by appellees, the estate had not been closed, and the administrator presented his final report in answer to a citation, requiring him to do so. This final report recapitulated the items in four



reports previously made by him to the court. The whole matter was within the control of the county court, and, upon exceptions to the final report, the items in the former reports were subject to review and correction by the county court.

The general rule, as announced in the text-books, is that "a partial or annual account is only a judgment *de bene esse*, often rendered *ex parte*, and only *prima facie* correct. On final settlement it may be opened to correct errors due to fraud or mistake, although the error was not excepted to or appealed from when the partial account was rendered." (7 Am. & Eng. Ency. of Law,—1st ed.—pp. 442-446). The allowance of a claim by the county court is not conclusive against the heir excepting to the administrator's final report, when such allowance is subject to impeachment for fraud or collusion in a court of equity. (*In re Corrington*, 124 Ill. 363; *Ward v. Durham*, 134 id. 195; *Shepard v. Speer*, 140 id. 238; *Schlink v. Maxton*, 153 id. 447). A judgment, allowing a claim against the estate of a deceased person, is only conclusive against the heir-at-law, or devisee, in respect to personal estate, where there has been no fraud or collusion in the rendition of such judgment. (*Ward v. Durham*, *supra*). The heir always has a standing in court to institute a proceeding to set aside the allowance of a claim by the probate court through fraud; and the county court, in the settlement of estates of deceased persons, exercises an equitable jurisdiction. (*Schlink v. Maxton*, *supra*, and cases there cited). In *Bliss v. Seaman*, 165 Ill. 422, the facts showed, that the appellees there introduced in evidence the several reports and accounts of an executor, which had been approved by the probate court, and then introduced testimony for the purpose of contradicting and surcharging said reports and accounts; and it was there contended, that the adjudications of the probate court, and orders made by it approving the different reports and partial settlements, were final and conclusive judg-

ments and not subject to collateral attack, and that said reports and accounts could not be impeached in the manner, in which the reports and accounts of appellant are sought to be impeached by the exceptions, filed in the case at bar to the final report of appellant as administrator; and this court there said (p. 428): "The statute (sec. 112, chap. 3) makes provision that all executors and administrators shall, every year, exhibit accounts of their administration, but that no final settlement shall be made and approved by the court unless the heirs of the decedent have been notified thereof. A partial or annual account of an executor or administrator is usually an *ex parte* proceeding, and is only a judgment *de bene esse* and only *prima facie* correct, and, although not excepted to or appealed from, is open to subsequent correction or challenge." We are, accordingly, of the opinion that, as the estate of the deceased, Edward B. Goodner, was not closed, the county court of Marion county had a right, when appellant's final report was presented for approval, to hear testimony for the purpose of contradicting and surcharging his former reports and accounts as administrator, and to surcharge and correct the same, if the testimony so introduced justified such action. (*Millard v. Harris*, 119 Ill. 185; *Long v. Thompson*, 60 id. 27; *Curts v. Brooks*, 71 id. 125).

*Second*—The amount of the claim of Harriet E. Marshall, mother of appellant and grandmother of appellee, Marietta E. Coleman, which was allowed against the estate of Edward B. Goodner, deceased, was \$1926.85. As to \$366.85 of this amount there seems to be no dispute. The contention is as to \$1560.00 of the claim, recited on its face to be for "care and maintenance from April 17, 1880, to April 17, 1890, of Edward B. Goodner, 520 weeks, at \$3.00 per week." In regard to this claim the Appellate Court say in their opinion: "That the claim was conceived in fraud, and that appellant knew it and assisted in carrying out the scheme, the evidence leaves

little doubt in our minds." The same conclusion in regard to the claim, thus announced by the Appellate Court, was reached by the county court and the circuit court. After a careful examination of the record, we concur in what is thus said by the Appellate Court.

This claim of \$1560.00 was made out by James E. Marshall on June 20, 1892, two months before any administrator was appointed upon the estate of his nephew, Edward B. Goodner. The evidence shows that, after James E. Marshall made out this claim, he presented it to his mother, and obtained her oath to its correctness. It was made out two years after the death of Edward B. Marshall. The appellee, Marietta E. Coleman, was present when the claim was presented to her grandmother by her uncle, James E. Marshall. James E. Marshall figured up how much his nephew's board would be for about thirteen years, and, when appellee, Marietta E. Coleman, expressed her surprise, and asked whether her grandmother was going to charge her brother's estate for his board, James E. Marshall answered: "No, this will be figured up, and your grandma will sign a receipt, which will be all right to make it look as though she received the money. It will be taken out of your mother's estate to protect your interest from this little half-sister." When James E. Marshall left, Mrs. Harriet E. Marshall said to her grand-daughter, that she did not understand these things, and that she might be signing her rights away. The testimony shows clearly, that Harriet E. Marshall herself had her doubts about the justness and correctness of presenting any such claim.

The appellee, Nellie May Goodner, was born in 1878, the year when Marietta E. Goodner went to live with her grandfather at Centralia. Her half-sister, Nellie May Goodner, remained with the mother of the latter, Mrs. Helen L. Goodner, who was the step-mother of appellee, Marietta. The half-sister lived in Nashville, in Washington county, while Marietta lived with her grandfather

in Centralia, and it is evident from the testimony that Marietta had not seen much of her step-mother, or half-sister, for many years when the matter of this claim came up. She was made to believe by her uncles, that her half-sister was intending to make a claim upon her deceased brother's estate, which was unjust, and not warranted by the law. She was ignorant of the law, and the fact, that her half-sister was as much an heir of her deceased brother as she herself was, was concealed from her. The uncles of Marietta, who was then young and inexperienced, inspired her with the fear that her half-sister was intending to take more of her deceased brother's estate than was just, and this fear was worked upon to keep her from making any opposition to the claim presented against the estate of her brother in the name of her grandmother. The object of making out and presenting that claim was to reduce as much as possible the interest in Edward B. Goodner's estate, which would go to his half-sister, the appellee, Nellie May Goodner. As is said by the Appellate Court in their opinion in deciding this case: James E. Marshall intended "to deplete the estate of his dead nephew by turning as much of it as possible back into the Marshall family, and this purpose will be more clearly seen from the claimed 'advancement' hereinafter referred to."

After the claim was made out and sworn to, the appellant, W. Scott Marshall, filed a petition asking the county court to appoint himself administrator of the estate of Edward B. Goodner, deceased. Shortly after his appointment as such administrator, this claim was presented in the county court, and the appellant, as administrator, made no defense against it, but entered his appearance, and waived the issuance of process, and allowed it without objection. He himself knew the character of the claim, and the object of its presentation, because the evidence shows that the appellee, Marietta E. Coleman, asked him about the claim, and he told her

that it was for her protection. He thus made the same statement to her which was made to her by her uncle, James E. Marshall; and whether the statements made by James E. Marshall to appellee, Marietta, in the presence of her grandmother, were competent or not in view of the absence at that time of the appellant, it is proven that the matter of this claim was talked of with James E. Marshall afterwards in the presence of the appellant. As he made the same statements in regard to it which his brother James E. Marshall had made, the admission of the testimony objected to could have done him no injury.

Where items in the account of an administrator or guardian, which are apparently regular upon their face, are allowed, there is a *prima facie* presumption in favor of their regularity; but "if it appears from the face of the account that items were improperly allowed, no such presumption will sustain them." (*Bond v. Lockwood*, 33 Ill. 212). Inasmuch as the items in this claim were for care and maintenance from April 17, 1880, to April 17, 1890, and the claim was not presented until January 3, 1893, against the estate of Edward B. Goodner, it is manifest that nearly all of the items in the claim had been barred by the Statute of Limitations when the claim was presented. It is true that, in the county court, there are no pleadings, and the Statute of Limitations need not be set up in writing, but the Statute of Limitations was applicable without being specially pleaded, and the defense of the Statute of Limitations should have been interposed by the appellant. In *Bromwell v. Estate of Bromwell*, 139 Ill. 424, we said (p. 427): "If these transactions were in fact loans of money, they created an indebtedness which was evidenced by no writing, and which was therefore subject to the limitation of five years. No evidence was offered tending to take the case out of the statute, or to bring it within any of the exceptions therein contained, and the plaintiff's claim must therefore be held to have been barred by limitation nearly five years before it was

filed in the probate court. No formal pleadings being required in the probate court, the Statute of Limitations applied without being specially pleaded, and under the evidence in the record, there can be no question that it constitutes a complete bar to said claim."

Some authorities hold that an administrator is not obliged to plead the general statute of limitations in actions on claims against the estate, and others hold that it is the duty of the personal representative to interpose the bar of the statute on every claim not properly asserted within the statutory period. (11 Am. & Eng. Ency. of Law,—2d ed.—p. 919; 2 Woerner's Am. Law of Admn.—2d ed.—sec. 401).

The tendency of the decisions in this State has been in favor of the position, that the statute should be insisted upon by the administrator against claims, which are barred by its terms. (*McCoy v. Morrow*, 18 Ill. 519; *Unknown Heirs v. Baker*, 23 id. 484; *Stillman v. Young*, 16 id. 318; *Bromwell v. Schubert*, 40 Ill. App. 330). Where an administrator, through bad faith or by failure to exercise reasonable diligence, diminishes the funds in his hands for distribution, he should be required to account, and can be compelled to render a just and true accounting by the probate court in the exercise of its equitable jurisdiction. (*In re Corrington*, 124 Ill. 362; *Whitney v. Peddicord*, 63 id. 249).

But even where it is held, that an administrator is not obliged to plead the general statute of limitations in actions on claims against the estate, he is only justified in not pleading the statute, when the claim is "otherwise justly due" or "otherwise well founded." (11 Am. & Eng. Ency. of Law,—2d ed.—p. 919; 2 Woerner's Am. Law of Admn.—2d ed.—sec. 401). As it is clear from what has already been said, that the claim now under consideration was not justly due or well founded, it was the duty of appellant to interpose that statute as a defense.

The claim is for care and maintenance of a grandson, Edward B. Goodner, for ten years, by a grandmother, Harriet E. Marshall. During the ten years in question Edward B. Marshall, the husband of Harriet E. Marshall, was alive, and was the head of the family. If any claim for care and maintenance existed, it was not in favor of Harriet E. Marshall, but in favor of the estate of Edward B. Marshall, deceased. During the years in question Edward B. Goodner was a member of the family of his grandfather, and the care and maintenance, which were extended to him by his grandfather, are presumed to have been so extended gratuitously in the absence of evidence as to any arrangement they were to be paid for." (*Heffron v. Brown*, 155 Ill. 322; *Switzer v. Kee*, 146 id. 577; *Miller v. Miller*, 16 id. 296; *Faloon v. McIntyre*, 118 id. 292; *Brush v. Blanchard*, 18 id. 46; *Collar v. Patterson*, 137 id. 403). No evidence appears in this record to rebut the presumption, that the care and maintenance referred to in this bill were furnished to the deceased, Edward B. Goodner, by his grandfather gratuitously. There is nothing to show, that it was ever the intention of the grandfather to charge his grandson with the support which he gave him. No entry of any charge was made in his books. The facts in regard to the relations of these parties were not presented to the county court, and no defense was made to the claim by the administrator upon the grounds here suggested. In this respect there was a gross neglect of his duty as administrator by the appellant. As administrator, he was charged with a trust, and with the duty of protecting the estate against unjust claims. We are of the opinion, that the action of the lower courts in charging appellant with the above amount so paid out upon this claim, and interest thereon, was correct.

*Third*—The next contention is in reference to the advancement, which is alleged to have been made by Edward B. Marshall in his lifetime to his daughter, Melvina E. Goodner, and her husband, Lyman T. Goodner. This

matter of the advancement was not broached, or put into tangible shape, until several years after the deaths of both Edward B. Marshall and Edward B. Goodner. Appellant says, that Edward B. Marshall advanced \$7000.00 to his daughter, Melvina E. Goodner, and her husband, during his lifetime in various sums from time to time during the period from May 1, 1866, to October 1, 1878. There is no written evidence, that any such advancement was made or intended by the deceased, Edward B. Marshall. James E. Marshall paid to the appellee, Marietta E. Coleman, and to the estate of Edward B. Goodner, deceased, their distributive share in the estate of their grandfather without making any deduction for such advancement. He, therefore, could not have known of it when he paid over such distributive share, although it is claimed by appellant that it was a matter of "family knowledge." James E. Marshall presented a petition to the county court, saying that he had paid over the amount of such advancement, to-wit, \$7000.00 to the two grandchildren of Edward B. Marshall by "mistake and inadvertence;" and the county court was requested to enter an order, and did enter an order, directing the appellant, as administrator of Edward B. Goodner's estate, to pay back \$3500.00, the one-half of the alleged advancement. If there was no advancement, then the refunding of this \$3500.00 by the appellant to James E. Marshall, administrator of Edward B. Marshall's estate, was wrong.

Section 7 of chapter 39, Revised Statutes, in regard to "Descent" provides as follows: "No gift or grant shall be deemed to have been made in advancement unless so expressed in writing or charged in writing, by the intestate, as an advancement, or acknowledged in writing by the child or other descendant." (2 Starr & Cur. Ann. Stat. —2d ed.—p. 1432). In view of this statute this court has held in several cases, that an advancement, which is not evidenced in the manner required by the statute, is in legal effect no advancement at all, however clear it may



appear that it was so intended. (*Long v. Long*, 118 Ill. 638; *Bartmess v. Fuller*, 170 id. 193; *Wilkinson v. Thomas*, 128 id. 363). In *Wilkinson v. Thomas*, *supra*, we held that parol statements and oral declarations are insufficient to establish an advancement. When the order was made by the county court, allowing the \$3500.00 in question to be refunded, no evidence was produced before that court to sustain the claimed advancement. Indeed, the county judge himself testifies in this case, that no evidence was offered in favor of the claims of Harriet E. Marshall, Charles P. Marshall or W. Scott Marshall against Edward B. Goodner's estate, except that shown by the claims themselves, and that no evidence was offered in favor of the refunding of the \$3500.00, mentioned in the petition of J. E. Marshall, other than the petition itself, as shown among the files in the case. But, upon the hearing upon the exceptions filed to the final report of appellant, he makes a statement in regard to this advancement, and his statement is the only evidence upon the subject. It is to be noted, that the appellant is in this matter an interested witness, testifying against the heirs and estate of his deceased nephew, Edward B. Goodner, because, when the amount of the advancement is returned to the estate of Edward B. Marshall, deceased, a distributive portion thereof, amounting, with the inherited interest of the deceased, Xenophon S. Marshall, to the sum of \$1600.00, or thereabouts, goes to the appellant, as a son and heir of E. B. Marshall.

Appellant says, that he and his father, E. B. Marshall, were partners in the banking business at Centralia, and in such business used a ledger which was opened in 1873; that his father, E. B. Marshall, carried some individual accounts in this partnership ledger; that, not earlier than 1873 or later than 1875, E. B. Marshall showed appellant an account on the ledger against Lyman T. Goodner and wife, headed "To advancement charged." He says, that E. B. Marshall footed up the account and it amounted to

\$7600.00; that, after the death of E. B. Marshall, his administrator made a search for the book and it could not be found; that in 1892, two years after the death of E. B. Marshall, this book was found in a wood-shed, with the leaf, which is alleged to have contained the advancement, torn out. Appellant swears, that he did not tear the leaf out, and James E. Marshall swears that he did not tear it out. The index to the ledger under the letter "G" was offered in evidence by appellant, and it showed "L. T. Goodner." The index would seem to point to an account in the ledger against L. T. Goodner, and not against Melvina E. Goodner. In their opinion deciding this case, the Appellate Court say: "We are not satisfied that the advancement was established by legal evidence, either as to its origin, or its continuance, if so established." We agree with this conclusion of the Appellate Court.

In the first place, the document, dated January 14, 1895, being the first paper which appears in this record in regard to the advancement, describes the moneys advanced as having been "received from year to year from May 1, 1866, up to October 1, 1878, amounting to the sum of \$7000.00." That is to say, Edward B. Marshall is represented as having made advancements to his daughter, Melvina, during a period of more than two years after her death. The evidence does not show the exact date of the death of Melvina E. Goodner, the first wife of Dr. Lyman T. Goodner, but it does show that Dr. Lyman T. Goodner married his second wife on August 24, 1876. Marshall could not, therefore, have made advancements to his daughter, Melvina E., as late as October 1, 1878, when the account in regard to the advancements is stated to have ended. Appellant says, that the amount of the advancements, as shown by the ledger, was \$7600.00, and yet the amount claimed was only \$7000.00. The ledger referred to was appellant's own book, because he states that it was a book belonging to the partnership between

himself and his father. He cannot make evidence for himself by entries in his own books. It appears that this book was brought to the bank, of which the appellant was president, and of which his brother, James E. Marshall, was cashier, after the death of his father. It is said, that the leaf, on which the advancement charges were made, was torn out of the book. As it is denied that such mutilation was made by either appellant, or his brother, James E. Marshall, the presumption is that the leaf, if any leaf in the book contained advancement charges, was torn out by the deceased, Edward B. Marshall himself. The ledger was found in his wood-shed upon his homestead premises, as we understand the evidence. It must, therefore, have been in his own possession at the time of his death. Where a will is found in a mutilated condition in the possession of a testator after the latter's death, and there is no evidence to fix the spoliation on any other person, the court will presume that it was done by the testator with the intention of canceling the will. (*Moore v. Moore*, 1 Phil. 375; *Lexley v. Jackson*, 3 id. 126; *Wilson v. Wilson*, id. 552; *Davis v. Davis*, 2 Adams, 223; *Taylor v. Pegram*, 151 Ill. 106; *Boyle v. Boyle*, 158 id. 228). There is nothing in the record to rebut the presumption that, if any leaf containing advancement charges was torn out of this ledger, it was done by the deceased, Edward B. Marshall himself *animo cancellandi*. There is no evidence in the record to show, that this \$7000.00 was ever paid to Melvina E. Goodner, or her husband. It does not appear when the entries in the ledger were made, nor whether or not there were original entries in any journal before they were posted in the ledger, and, if so, when such entries were made in the journal. The appellant does not attempt to prove the contents of the leaf which, as he alleges, was torn out of the book, and which, as he further alleges, contained the items of advancement. It does no good to prove the loss of a written instrument, unless secondary evidence is intro-

duced of its contents. (*Hansen v. American Ins. Co.* 57 Iowa, 741; *Kearney v. New York*, 92 N. Y. 617). If the contents of the lost leaf were proven, it would be evidence offered in the interest of the intestate, E. B. Marshall. It would not be competent testimony, except as to such entries as are shown to have been made contemporaneously with the facts of the record. Book accounts are only admissible in favor of the party who keeps them, when the entries are made contemporaneously with the transactions recorded; and the same rule applies to books and entries of deceased persons. (Greenleaf on Evidence, —13th ed.—sec. 118; Wharton on Evidence, secs. 246-688; 2 Woerner's Am. Law of Admn.—2d ed.—sec. 558; *Nelson v. Nelson*, 90 Mo. 460). "Declarations or book entries of the donor subsequent to the transaction are inadmissible, unless they are of the *res gestæ* or against interest." (2 Woerner's Am. Law of Admn.—2d ed.—sec. 558).

The evidence is not in our opinion sufficient to show that any advancement was made as claimed. It is not contended that Nellie May Goodner, who was a minor until August 2, 1896, made any admissions or waivers in regard to this advancement, which were binding upon her. As the Appellate Court say in their opinion, "the appellant's acts, so far as this advancement is concerned, and so far as they affected Nellie May Goodner, were in fraud of her rights." Therefore, the circuit court did not err in sustaining the exceptions of the appellee, Nellie May Goodner, to the refunding of the \$3500.00, so far as the \$1750.00 of it, which would be distributed to her, is concerned.

The Appellate Court, however, sustained the circuit court in overruling the exceptions of the appellee, Marietta E. Coleman, to the refunding of the \$3500.00, and sustained the circuit court in refusing to charge the appellant with \$1750.00, the half of the \$3500.00 which would belong to Marietta E. Coleman, as distributee of her deceased brother's estate, and as his heir. We cannot agree

with the Appellate Court in this conclusion. We think that the county court decided correctly in requiring the appellant to account for the whole of the \$3500.00 paid out by him, both the part which would go to the appellee, Nellie May Goodner, and the part which would go to the appellee, Marietta E. Coleman. What may have been done with the \$3500.00 by James E. Marshall, after he received it, is not the question here. The question here is whether appellant's account, as administrator, should be surcharged to the amount of the sums wrongfully paid out by him.

There can be no question, that the document, dated January 14, 1895, signed by Marietta E. Coleman, was obtained from her by gross fraud and misrepresentation on the part of her uncles, and their attorney in Centralia. She signed this document when she was a resident of Colorado, and the wife of a citizen of Colorado. It was sent to her by mail. She at first declined to sign it, and wrote for some information in regard to it, but finally did sign it in view of letters written to her by her uncle, Charles P. Marshall, and the attorney of her uncle, W. Scott Marshall, the appellant herein. These letters play upon her fear that her half-sister will do something to take her estate away from her. A partition suit in reference to the real estate seems to have been begun by Nellie May Goodner. She was a legal heir of her deceased half-brother, Edward B. Goodner, and this fact must have been known to appellant, and his brothers. The Illinois statute, making her half-sister an heir, was not known to Marietta E. Coleman. The representations, which induced her to sign the document, dated January 14, 1895, came to her in letters sent to Colorado, of which State she was then a citizen. The maxim, *ignorantia legis neminem excusat*, has no application here, for the reason that mistakes as to foreign laws are regarded as mistakes of fact. Ignorance of law, which will not excuse, is ignorance of the laws of one's own country or State, but

the laws of foreign countries or other States are facts. (*Schaefer v. Wunderle*, 154 Ill. 577). Being a resident of Colorado, she was not affected with knowledge of the statutes of Illinois, in which State she did not reside.

The document of January 14, 1895, sent to her was signed by her three uncles; one of them was the administrator of her deceased brother's estate; the other was the administrator of her grandfather's estate; and the third was the guardian of her brother. They stood to her in peculiarly confidential and fiduciary relations. Where two persons stand in such relation to each other that confidence is necessarily reposed by one in the other, and the one has over the other an influence which naturally grows out of that confidence, the abuse of such confidence or influence to obtain an advantage, at the expense of the confiding party, will not be permitted to prevail, even though the transaction could not have been impeached, if no such confidential relations had existed. (*Tait v. Williamson*, L. R. 2 Ch. 55; 10 Am. & Eng. Ency. of Law, p. 327; 1 id. p. 375; *Purvines v. Harrison*, 151 Ill. 219; *Sayles v. Christie*, ante, p. 420; *White v. Ross*, 160 Ill. 56).

In order to induce Mrs. Coleman to sign the document, dated January 14, 1895, a lawyer, who was also the father-in-law of appellant, wrote her a letter referring to the probability that a suit would be brought by her half-sister, and advising her to sign the advancement paper of January 14, 1895, expressing the opinion that her uncles would be honest with her in the matter. Her uncle, Charles P. Marshall, wrote her a letter in which he said: "When a document is signed by your three uncles, you ought to know that it means straight business, even though you do not understand the purpose at the time." It does not appear, that Mrs. Coleman was a party to any scheme to defraud her half-sister, but she was made to believe that her half-sister had no rights in the estate of her deceased brother. We agree with the Appellate Court when they say in their opinion in regard to Mrs. Cole-

man: "We are satisfied from the evidence that up to June 5, 1895, she was the dupe of designing men." We are, however, still further of the opinion, that she was the dupe of designing men on June 5, 1895, and June 25, 1895, when she signed the subsequent papers signed by her, having reference to this advancement, and mentioned in the statement preceding this opinion. They were all parts of one and the same fraudulent scheme.

As soon as the document, dated January 14, 1895, was signed by her and received by her uncles, one of them wrote her a letter on April 30, 1895, proposing to buy out her interest in the real estate of her deceased grandfather. When she came to Centralia from Colorado, she and her husband were taken to the bank, of which her uncle, the appellant, was the president, and her uncle, James E. Marshall, was the cashier, in the evening, and there remained with them all night until four or five o'clock in the morning. The appellant represented to her that it was necessary for her to keep out of the way, in order to avoid service of summons upon her in some suit, which had been instituted by her half-sister. As this suit was a simple partition suit, which her half-sister had a right to bring, it would have made no difference if she had been served with process, but she was made to believe that it was a serious matter. In addition to this, she was told by the appellant, that they had in their possession letters, written by her father in his lifetime, which, if made public, would disgrace her, and that they would disgrace her by the publication of such letters, unless she came to their terms in regard to the advancement, and in regard to the sale of her interest. In view of these and other facts, which it is impossible for us within the limits of this opinion to further comment upon, the written consents to this advancement, which were procured from her, were so procured by fraud and misrepresentation, and she ought not to be bound thereby. The validity of the deeds of her lands, which she executed

to her uncles, is not involved in this proceeding, and we pass no opinion upon that question. But the documents show, that the purchase of her interest in the land by her uncles was made use of by them, in order to force her to consent to the refunding of the advancement. She and her husband, who was a young man teaching school in Colorado, without acquaintance in Illinois, and without practical business knowledge, had no disinterested legal adviser to inform them in regard to their rights, and were imposed upon and defrauded. We are of the opinion, that the Appellate and circuit courts should have required the appellant to account for the whole of the \$3500.00, which appellant paid out to the administrator of E. B. Marshall's estate on account of the portion of this alleged advancement, which had been paid to Edward B. Goodner's estate.

Appellant was properly charged with ten per cent interest. Under the statute an administrator is chargeable with ten per cent annual interest on moneys, bonds, notes and credits in his possession or control as property or assets of the estate after a period of two years and six months from the date of his letters of administration, unless good cause is shown to the court why such should not be taxed. (Rev. Stat. chap. 3, sec. 114). It appears here that appellant refused to make final settlement, and, when compelled to render a final account on citation, he filed a written protest against any order of distribution at that time, although it was about four and one-half years after his appointment. He had this money in his hands, and, as he paid it out under circumstances which required his account to be surcharged, and neglected to make settlement, he has failed to show the court good cause why the ten per cent interest should not be charged against him. (*In re Schofield*, 99 Ill. 513).

*Fourth*—It is said by the appellant that the appellee, Marietta E. Coleman, should have taken an appeal from the judgment of the circuit court, and that she was not



entitled to assign as cross-error in the Appellate Court, that the circuit court disallowed one-half of the \$3500.00 above referred to. We are of the opinion that this question can be raised by the assignment of cross-errors, and a cross-error has been assigned by the appellee, Marietta E. Coleman, as to this item. The item in the reports of the administrator was one item of \$3500.00, and the exceptions filed were filed to that particular item. The order, made by the county court, was an order that the appellant should refund \$3500.00. This item was one, and not divisible. It has been held, that each item in an administrator's account is a separate claim depending alone upon its own merits, having no connection with the other items, and that an appeal by the administrator from an order or judgment, rejecting one of his claims against the estate, only brings up for review the propriety of the ruling in respect to such rejected claim. (*Millard v. Harris*, 119 Ill. 185; *Curts v. Brooks*, 71 id. 125; *Morgan v. Morgan*, 83 id. 196). This rule is applicable, as between the claim of Harriet E. Marshall for \$1560.00 and the claim of Charles P. Marshall for \$168.00 and the claim for the refunding of the \$3500.00. Each of these claims is a separate item. The rule, however, in regard to a separate appeal from a judgment as to each separate item in an administrator's account has no application here, because the item, as to which the cross-error is assigned, was in the county court one item of \$3500.00, and not two items of \$1750.00 each. The allowance of a part of it, instead of the whole, does not split it into two claims.

*Fifth*—As to the item of \$168.00 for medical charges by Charles P. Marshall against the estate of Edward B. Goodner, deceased, no appeal was taken from the order of the circuit court, or from the judgment of the Appellate Court in reference to the allowance of that item. As it was a separate item in the account, its allowance cannot be here attacked by means of the assignment of a cross-error.

*Sixth*—The appellant charges \$14.88 for traveling expenses from Chicago, and return, in answer to a citation from the county court. This item of \$14.88 was disallowed by the circuit court, and the order disallowing the same has been affirmed by the Appellate Court. The action of the lower courts in regard to this item was correct. After appellant was appointed administrator of the estate of Edward B. Goodner, he removed to the city of Chicago; and this item is made up of charges for his traveling expenses in coming from and returning to Chicago in answer to a citation which was issued against him, because he failed to settle his accounts. The item was properly disallowed.

*Seventh*—The complaint is made, that the costs were taxed against the appellant personally, and not against him as administrator. This action of the lower courts was proper, because the costs of this proceeding have been caused by the misconduct of the appellant himself.

The judgment of the Appellate Court is affirmed, except so far as that judgment affirmed the decree of the circuit court requiring appellant to surcharge himself with only \$1750.00; and ten per cent interest, of the \$3500.00 item, instead of requiring him to surcharge himself with the whole of the \$3500.00 item and ten per cent interest; he should have been charged with the whole of the \$3500.00 and ten per cent interest.

Accordingly, the judgment of the Appellate Court and the decree of the circuit court are reversed, so far as they failed to require appellant to surcharge himself with the whole of the \$3500.00 item and ten per cent interest thereon; and the cause is remanded to the circuit court with directions to enter a decree in accordance with the views herein expressed.

*Partly affirmed and partly reversed.*

## THEO. NOEL

v.

## THE PEOPLE OF THE STATE OF ILLINOIS.

*Opinion filed October 19, 1900—Rehearing denied December 6, 1900.*

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1. **STATUTES**—*when law is invalid for conferring arbitrary power.* A law which invests any body of officials with arbitrary discretion, which may be exercised in the interest of a favored few, is invalid because of the opportunity it affords for unjust discrimination.

2. **CONSTITUTIONAL LAW**—*section 8 of Pharmacy act of 1895 is invalid.* Section 8 of the Pharmacy act, (Laws of 1895, p. 246,) providing that the Board of Pharmacy may, "in their discretion," issue permits to parties engaged in business in villages or other localities to sell domestic remedies and proprietary medicines, is invalid for conferring discretionary power upon and delegating legislative power to such board.

3. **SAME**—*part of Pharmacy act of 1895 is unconstitutional.* The provisions of the Pharmacy act of 1895 which, in effect, confer upon registered pharmacists the exclusive right to sell patent or proprietary medicines and domestic remedies without requiring such pharmacists to make any examination or analysis thereof, are invalid, as conferring a special power, in violation of section 22 of article 4 of the constitution.

4. **SAME**—*provisions prohibiting parties not registered pharmacists from selling their own compounds are valid.* The provisions of the Pharmacy act of 1895, in so far as they prohibit persons not registered pharmacists from retailing or dispensing drugs, medicines or poisons prepared or compounded by themselves, are valid, being a proper exercise of police power in the interest of the public health.

WILKIN, J., dissenting.

APPEAL from the Criminal Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding.

This is an action of debt, brought by the People of the State of Illinois against Theo. Noel, the appellant, to recover a penalty for the violation of section 2 of the Pharmacy act. On September 1, 1899, a judgment was rendered before a justice of the peace in Cook county on the verdict of a jury against the appellant, and in favor of the appellees, for twenty dollars and costs. An appeal was taken by the appellant to the criminal court of Cook

county, where the cause was submitted to the court for trial without a jury, and, on February 2, 1900, judgment was rendered for the People against the appellant for twenty dollars and costs. The present appeal is prosecuted from such judgment of the criminal court of Cook county.

Ever since 1880 appellant has been, and is, engaged in preparing and selling in various forms, but principally in a powdered state, a kind of iron ore, called "Vitæ-Ore." This ore, when it has been mined and exposed for some years to the air, becomes disintegrated, or slacked, somewhat like burned limestone. When it has reached this stage, if it be put in water, it makes an agreeable sub-acid drink, which possesses, or is claimed to possess, valuable medicinal qualities. Appellant puts it up in powdered form, in sealed packages, from two ounces in weight upward, and in this form it is distributed and sold.

In addition to this Vitæ-Ore, the appellant has been, and is, manufacturing and selling a number of other medicinal articles, such as tooth powder, hair tonic, complexion cream, etc. His place of business is, and for some years has been, at 860 West Polk street, in Chicago, where he employs a large force of men and women, preparing and putting up these various articles in sealed packages, boxes, bottles, etc., and shipping them out by freight, express or mail to his agents. He does not sell at retail any more than any ordinary wholesale merchant, but, if applied to, sells one or more sealed packages or articles, as the applicant may desire. As general manager of the business, he employs his son, Dr. Joseph Noel, a graduate of the Jefferson Medical College of Philadelphia, and a physician, who has been engaged for several years in general practice, and is regularly licensed to practice medicine in the State of Illinois.

On October 30, 1897, appellant applied to the State Board of Pharmacy at Springfield for a license to sell his

products, tendering with such application the statutory fee of one dollar therefor, but the board refused to grant said license without giving any reason for such refusal. On June 28, 1899, a person in appellant's employment sold a package of said Vitæ-Ore; and the person, so selling it, was not then a registered pharmacist, or assistant registered pharmacist, or a pharmacist's apprentice. The purchaser of said package paid a dollar for it. The package was put in evidence. It was in a strong paper bag, securely sealed up, and contained about two ounces of the powder, labeled "Concentrated Compound Extract of Vitæ-Ore Elixir," etc. It is admitted that appellant's place of business was not a drug store, and that drugs were not kept there.

E. A. SHERBURNE, for appellant.

CHARLES S. DENEEN, State's Attorney, (FRED L. FAKE, GABRIEL J. NORDEN, and KITT GOULD, of counsel,) for the People.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

Upon the trial of this case in the court below, the appellant asked the court to hold as law, in the decision of the case, several propositions of law, questioning the constitutionality of sections 2 and 8 of the act of the legislature of Illinois entitled: "An act to regulate the practice of pharmacy in the State of Illinois," as amended and in force July 1, 1895. (Hurd's Stat. of Ill. 1897, pp. 1075, 1076). These propositions of law were refused by the trial court, and to the ruling of the court in this regard exception was duly taken by the appellant. The question, thus presented for our consideration, is the constitutionality of said sections 2 and 8 of the Pharmacy act.

Section 2 is as follows: "It shall be unlawful for any person not a registered pharmacist within the meaning

of this act to open or conduct any pharmacy, dispensary, drug store, apothecary shop or store, for the purpose of retailing, compounding or dispensing drugs, medicines, or poisons, and any person violating the provisions of this section shall be liable to a penalty of not less than twenty nor more than one hundred dollars for every such violation: *Provided, however*, that nothing in this act shall prevent any person or persons owning a drug store or pharmacy who shall employ and place in active and personal charge of the same, a registered pharmacist, and that nothing herein contained shall apply to nor in any manner interfere with the practice of any physician, or prevent him from supplying to his patients such articles as may seem to him proper, nor with the exclusively wholesale business of any wholesale druggist; nor with the sale of patent and proprietary medicines and domestic remedies by retail dealers in localities as hereinafter provided."

Section 8 of the act is as follows: "The Board of Pharmacy may in their discretion issue permits to persons, firms or corporations engaged in business in villages or other localities, empowering them to sell the usual domestic remedies and proprietary medicines under such restrictions as the Board of Pharmacy may deem proper. Each applicant for this permit shall pay to the said board the sum of one dollar before said permit shall issue. Said permit shall specifically state just what the holder thereof is allowed to sell."

Section 4 of the act is as follows: "The term drug store or pharmacy shall for all purposes of this act be construed to mean a store, shop or other place of business where drugs, medicines or poisons are compounded, dispensed or sold at retail."

The proviso to section 2 provides, that nothing contained in the act shall apply to, or interfere with, the sale of patent and proprietary medicines and domestic remedies by retail dealers in localities "as hereinafter

provided." The words "as hereinafter provided" refer to section 8 of the act. The latter section confers upon the Board of Pharmacy the power in their discretion to issue permits to persons, firms or corporations engaged in business in villages or other localities, empowering them to sell the usual domestic remedies and proprietary medicines under such restrictions as the board may deem proper. It is manifest, that section 8 vests an arbitrary power in the Board of Pharmacy to say who shall, and who shall not, sell the usual domestic and proprietary remedies in villages and other localities, and just exactly what they are allowed to sell. Section 8 in no way regulates or controls the discretion vested thereby in the board. The official discretion, conferred upon the board, is unregulated, and not subjected to any permanent provisions operating generally and impartially. No conditions are prescribed, upon which the permit, authorizing the sale of the usual domestic remedies and proprietary medicines, is to be issued. A law, which thus invests any board, or body of officials, with a discretion, which is purely arbitrary, and which may be exercised in the interest of a favored few, is invalid. It makes an unjust discrimination between persons coming within the same class. A person, firm or corporation engaged in business in a village or other locality may sell these domestic remedies and proprietary medicines if a permit is obtained from the Board of Pharmacy, provided such board sees fit in its discretion, and under such restrictions as it may deem proper, to issue such permit. The board is thus authorized to confer a privilege upon one person, firm or corporation, and to deny the same privilege to any other person, firm or corporation, and is not required to be governed, in doing so, by any fixed rules or regulations, but may be moved thereto only by its own caprice, or favoritism. Laws, thus conferring discretionary and arbitrary power upon statutory officials, are not only invalid for the reasons already stated, but amount in effect to a

delegation by the legislature of its legislative functions to the board or officials in question. The legislature undoubtedly has the power, in the interest of the public health, to pass a law, regulating the disposition of these domestic remedies and proprietary medicines; but, instead of doing so in section 8, it has abdicated its own power upon the subject, and conferred such power upon the Board of Pharmacy to be exercised according to the discretion of the board. (*Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9; *City of Cairo v. Feuchter*, 159 id. 155; *City of Monmouth v. Popel*, 183 id. 634).

But, independently of the considerations thus far presented, section 2 not only forbids any person to compound or dispense drugs or medicines, and sell the drugs or medicines, so compounded, at retail unless such person is a registered pharmacist, but it also forbids any person to sell patent and proprietary medicines and domestic remedies at retail unless such person is a registered pharmacist. In other words, a druggist is not only forbidden by section 2 to sell drugs, compounded by himself, unless he or his employee is a registered pharmacist, but he is also forbidden to sell patent and proprietary medicines and domestic remedies, not compounded by himself, unless he or his employee is a registered pharmacist. Section 2 thus confers upon registered pharmacists the exclusive right to sell at retail patent and proprietary medicines and domestic remedies. This is apparent from the last clause of the proviso to section 2. The fact, that the sale of these remedies in certain localities is mentioned as an exception, makes it clear that their sale in other places was included in the prohibition with all other drugs, medicines and poisons. "When the legislature has attached a proviso to a section, the natural presumption is that, but for the proviso, the enacting part of the statute would have included the subject matter of the proviso." (23 Am. & Eng. Ency. of Law, p. 437).



The act contains nowhere any provision for the inspection or analysis of these patent or proprietary medicines by the registered pharmacists, who are clothed with the power to sell them.

Undoubtedly the legislature has the right, under the police power, to pass enactments for the benefit and promotion of the public health. But it is well settled, that the exercise of the police power must be limited to such measures, as are designed to promote the public health, the public morals, the public safety, or the public welfare. (*City of Chicago v. Netcher*, 183 Ill. 104). When it can be seen from the provisions of a statute, that it has no tendency to promote the public health, safety, morals, comfort or welfare, the courts are authorized to declare it invalid. It is unquestionably true, that the State has as much right to regulate the sale of patent and proprietary medicines and domestic remedies, as it has to regulate the sale of any other kinds of medicines and remedies. But these patent and proprietary medicines and remedies are generally put up in sealed packages. In this form they can as well be sold by any person as by a registered pharmacist. The vice of the present Pharmacy act is, that it gives to the registered pharmacists the exclusive privilege of selling these patent and proprietary medicines and remedies, and excludes all other persons from doing so, while, at the same time, it makes no requirement of such registered pharmacists that they make any analysis, inspection or examination of the same. In this regard the act gives to registered pharmacists a monopoly of the business of selling patent medicines without in any manner protecting the public health. The public health is not protected by limiting these sales to registered pharmacists, who make no examination of what they sell.

Counsel for the People claim, that registered pharmacists are more likely to know the qualities of these patent medicines than other persons, who are not regis-

tered pharmacists. But registered pharmacists will be as apt, as other men, to sell such patent medicines as there is a public demand for, when they are relieved of all responsibility for the character of such medicines, and are not required in any way to guarantee their character or adaptability to the cures, which they claim to effect.

Section 2 of article 2 of the constitution of this State provides, that "no person shall be deprived of life, liberty or property, without due process of law." Involved in the right to own property is the right to sell it; and, when the owner is deprived of the right to sell his property, he is deprived of his property within the meaning of the constitution, because there is thereby taken from him one of the incidents of ownership. Section 22 of article 4 of the constitution provides, that "the General Assembly shall not pass local or special laws \* \* \* for \* \* \* granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever." To confer upon registered pharmacists the right to sell these patent and proprietary medicines, without requiring of them to make any inspection or examination of the same, is to confer upon them a special and exclusive privilege in violation of said section 22 of article 4, when, at the same time, such right of sale is denied to all other persons, firms or corporations.

The views thus expressed are sustained by a decision, made by the Supreme Court of Minnesota in the case of *State v. Donaldson*, 41 Minn. 74. In that case, the Supreme Court of Minnesota, in commenting upon the provisions of an act similar to the Pharmacy act of this State, say: "The manifest purpose of the act was to protect the public against the mistakes and ignorance of incompetent and unskilled persons in the preparation and sale of drugs and medicines. \* \* \* This is the expressed object of the general provisions of this act. They all look to the protection of the health and lives of the public by restricting the business of preparing and

dispensing or selling drugs and medicines to those who have the requisite knowledge and skill on the subject. \* \* \* Now, it is a matter of common knowledge that what are called 'patent' or 'proprietary' medicines are prepared ready for immediate use by the public, put up in packages or bottles labeled with the name, and accompanied with wrappers containing directions for their use, and the conditions for which they are specifics. \* \* \* There is nothing that calls into use any skill or science on the part of the one who sells them. One man can do it just as well as another. \* \* \* The fact that the seller is a pharmacist, of itself, furnishes no protection to the public. \* \* \* Merely to limit their sale to pharmacists would furnish no protection to the public, without some further regulation as to inspection or analysis that would tend to exclude from sale those that might be injurious to health, or something requiring pharmacists to exercise their skill and science in determining the quality and properties of such as they sold. If we turn to our statute we find an entire absence of any such provisions. \* \* \* Had the act made pharmacists responsible for their quality, this might have had some tendency to protect the public." After disposing of the suggestion, as being "too uncertain and attenuated to be entitled to any weight," that the mere fact of limiting the sale to pharmacists would tend to protect the public because they would be more likely than others to know the qualities of patent medicines, the court then proceeds as follows: "In the absence of some other regulations, a statute merely limiting the sale of patent medicines to a particular class would not and could not have any natural or reasonable tendency to protect the public. Such a law would not go far enough to amount to a police regulation. It would be merely giving a certain class of men a monopoly of the trade. This is not within the police power of the State. \* \* \* A law enacted in the exercise of the police power must in fact be a police

law. If it be a law for the protection of public health, it must be a health law having some relation to public health. \* \* \* If it is apparent on the face of the act that its provisions, from their very nature, cannot and will not conduce to any legitimate police purpose, it is the right as well as the duty of the court to pronounce it invalid, as in excess of legislative power and an arbitrary and unwarranted interference with the right of the citizen to pursue any lawful occupation. According to the construction claimed for it, the provision of the act as to the sale of patent or proprietary medicines would be of just this character. It would be giving pharmacists a monopoly of the business, without in any manner protecting public health." The reasoning of the Minnesota court is precisely applicable to the case at bar, for the reason that, in the Illinois Pharmacy act, as was the case with the Minnesota Pharmacy act, there is an entire absence of any regulation as to such inspection or analysis of these patent or proprietary medicines by registered pharmacists, as would tend to exclude from sale those medicines that might be injurious to health; nor is there anything in the Illinois act requiring registered pharmacists to exercise their skill and science in determining the quality or properties of such patent or proprietary medicines as they may sell.

We are, however, not disposed to hold that the whole act is unconstitutional because of the limitation of the right to sell these patent or proprietary medicines to such persons as are registered pharmacists. An act of the legislature may be opposed in some of its provisions to the constitution, while others standing by themselves would be unobjectionable. The fact, that a part of a statute may be unconstitutional, will not authorize the courts to declare the remainder void, unless all the provisions are so connected in subject matter, and are so dependent on each other, that the legislature will not be presumed to have passed the one without the other. The

valid and invalid provisions may even be contained in the same section, and yet be perfectly distinct and separate, so that the one may stand though the other must fall. Where a statute attempts to accomplish two or more objects, and is void as to one, it may still be complete and valid as to the other. (Cooley's Const. Lim.—5th ed.—pp. 211-213; *Cicero Lumber Co. v. Town of Cicero*, *supra*; *People ex rel. v. Illinois State Reformatory*, 148 Ill. 413; *Donnersberger v. Prendergast*, 128 id. 229; *People v. Cooper*, 83 id. 585; *Hinze v. People*, 92 id. 406; 23 Am. & Eng. Ency. of Law, pp. 225-227, and notes).

An examination of the Pharmacy act, as amended and in force on July 1, 1895, will show, that it had in view the accomplishment of two objects. One of these is to prohibit the compounding of medicines and the sale of the same, as thus compounded, unless such compounding and sale shall be made by a registered pharmacist. The other object is to prohibit the sale of patent and proprietary medicines and domestic remedies by any other person than a registered pharmacist. One case, contemplated by the statute, is where the druggist, or other person, puts up prescriptions, or compounds medicines, and then sells them, while the other case, contemplated by the statute, is the sale of patent and proprietary medicines and domestic remedies without the compounding and putting up of the same by the person selling them. The distinction thus indicated is clearly shown in sections 2, 8 and 14 of the act. While, therefore, we hold the act to be invalid in the respect already pointed out, we yet hold it to be valid, so far as it applies to persons retailing, compounding or dispensing drugs, medicines or poisons where the person so retailing has, at the same time, put up or prepared or compounded the drugs or medicines, so sold by him.

For the reasons above indicated, we are of the opinion, that the trial court erred in refusing to hold as law the propositions of law, submitted to it by the appellant

upon the trial below. Accordingly, the judgment of the criminal court of Cook county is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

*Reversed and remanded.*

Mr. JUSTICE WILKIN, dissenting.

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CHARLES W. BUTTERFIELD *et al.*

v.

ELIZABETH SAWYER *et al.*

*Opinion filed October 19, 1900—Petition stricken from files December 6, 1900.*

1. VESTED RIGHTS—*future expectation of property is not a vested right.* A mere expectation of property in the future is not a vested right, and may be changed, modified or abolished by legislative action.

2. DEEDS—*when deed itself is the only criterion of grantor's intention.* If there is no ambiguity in the terms used in a deed, or if the language used has a settled legal meaning, the deed itself is the only criterion of the grantor's intention.

3. SAME—*deed construed as to when adopted child will take remainder as "heir generally."* A remainder to go to the "heirs generally" of the grantee in case of her death leaving no child or children, will pass to an adopted child of the grantee by virtue of his right of inheritance conferred by the Adoption act, even though such act was not in existence when the deed was made, if there is nothing to show that the term "heirs generally" was not used in its legal sense.

MAGRUDER, J., and BOGGS, C. J., dissenting.

APPEAL from the Circuit Court of Cook county; the Hon. ELBRIDGE HANEY, Judge, presiding.

Appellants filed their bill in the circuit court of Cook county for the partition of certain lands in that county, claiming to be the heirs-at-law of Adeline B. Gellatly and tenants in common with appellees, except Roy Gellatly and his guardian. They base their claim of title to the premises in question upon a certain deed made in Feb-

ruary, 1853, by their grandfather, Justin Butterfield, to Adeline Butterfield, his daughter. After setting out the parties thereto, that deed reads: "That the said Justin Butterfield, and Elizabeth, his wife, as well for and in consideration of the natural love and affection which they have and do bear unto the said Adeline Butterfield, as also for the better maintenance, support and livelihood of her, the said Adeline Butterfield, have given, granted and confirmed, and by these presents do give, grant and confirm, unto the said Adeline Butterfield, \* \* \* to have and to hold all and singular the premises hereby granted and confirmed or mentioned, or intended so to be, with the appurtenances, unto the said Adeline Butterfield for and during her natural life, with remainder to her child or children that may be living at the time of her decease, and to the heirs and assigns of such child or children forever, and in default of child or children of the said Adeline Butterfield at the time of her decease, then to the heirs generally of the said Adeline Butterfield forever, except no part shall go to George Butterfield." George Butterfield was a brother of Adeline.

After the making of the deed above set out, Adeline Butterfield married and became the widow of one Francis Gellatly, who died leaving no children of Adeline Gellatly surviving. Subsequently the widow, by proper proceeding in the county court of Cook county, adopted a child, Roy Cramer, (now Roy Gellatly, one of the appellees herein,) and in the decree of adoption entered by the county court it was provided that from the date thereof "the said Roy Cramer shall, to all legal intents and purposes, be the child of the petitioner, Ada B. Gellatly, and for the purposes of inheritance, and all other legal incidents and consequences, shall be the same as if he had been born to her in lawful wedlock," and that the name of the child shall be changed to Roy Gellatly. Adeline Gellatly died leaving no child or children by birth. The bill alleges that Roy Gellatly, the adopted

child of Adeline Gellatly, (*nee* Butterfield,) is in possession, by his guardian, of the premises in controversy and collecting the rents, and asks the appointment of a receiver therefor; prays that Roy Gellatly and his guardian shall let appellants and their co-tenants into possession of the premises, and that partition be made of the same.

The circuit court, on the hearing, entered a decree finding that by virtue of the decree of adoption the appellee, Roy Gellatly, became the remainder-man under the deed from Justin Butterfield to Adeline Butterfield (Gellatly), and that upon her death, as her child and sole heir-at-law, he became seized in fee simple of the premises described in the deed, and enjoined the appellants and their co-tenants from claiming any right, title or interest in the premises. From that decree of the circuit court the appellants, their co-tenants (appellees) joining them, prosecute this appeal.

JOHN T. BARKER, for appellants.

BULKLEY, GRAY & MORE, and HECKMAN, ELSDON & SHAW, for appellees.

MR. JUSTICE WILKIN delivered the opinion of the court:

The *habendum* clause of the deed in question here, after creating a life estate in the grantee, Adeline Butterfield, presents what is sometimes termed a contingency with a double aspect. The first event or aspect contemplated is that the grantee should have a child or children, who should take the remainder in fee simple, limited upon the life estate. In the event of the death of the life tenant leaving surviving her no child or children to take the remainder, then the second aspect of the deed was to become effective and vest the remainder in the "heirs generally of the said Adeline Butterfield," with the exception of George Butterfield. The court below decreed that Roy Gellatly, the adopted child of Adeline Gellatly, (*nee* Butterfield,) by virtue of his adoption became the



"child" of the grantee, within the meaning of the language of the deed. This decree is earnestly opposed by the appellants on the ground that at the date of the conveyance in question, February, 1853, there was in effect no statute of adoption in this State, and that the grantor, therefore, could not and did not, in creating the remainder in the deed in the "child" or "children" of Adeline Gellatly, contemplate the adoption by her of a child, and that to so decree is, in effect, the creation of an artificial child, which at the date of the deed could have and did have no existence in contemplation of law or in the mind of the maker of the deed.

The question presented for our decision is, who is entitled to the fee in the premises in controversy?—and in our view of the case, so far as the ultimate vesting of the fee is concerned, it does not matter whether or not Roy Gellatly, the adopted child, is a "child" within the meaning of the deed, and entitled, as such, to the remainder upon the determination of the life estate. If it should be held that the circuit court committed no error in its finding, the remainder, as a matter of course, vests in Roy Gellatly. If, however, it be conceded that that finding, in so far as it holds Roy Gellatly a "child," within the meaning of the deed, is erroneous, still, in our opinion he must take the fee as "heir generally" of Adeline Gellatly under the second aspect of the contingency in the deed.

Appellants and their alleged co-tenants, if entitled to the fee at all, must be the "heirs generally" of Adeline Gellatly. Their estate as such, prior to her death, would have been but a mere expectancy, contingent upon her death without child or children in whom the remainder should vest, and in no sense a vested right. It is well settled that a mere expectation of property in the future is not a vested right, and may be changed, modified or abolished by legislative action. (*McNeer v. McNeer*, 142 Ill. 388; *Jackson v. Jackson*, 144 id. 274; *Henson v. Moore*, 104 id. 403.) A contingent remainder, such as appellants

had in the premises prior to the decease of Adeline Gellatly, does not rise to the dignity of an estate in the land and confers no interest in the seizin. Strictly speaking it is not an estate at all, but a mere chance of having one if the contingency turn out favorably to the remainderman. (20 Am. & Eng. Ency. of Law, p. 849.) It will be conceded that if Adeline Gellatly had died leaving no child capable of becoming her heir-at-law, appellants and their alleged co-tenants would be entitled to the fee in the premises in controversy under that clause of the deed granting the remainder to the "heirs generally of the said Adeline Gellatly."

It is earnestly insisted on behalf of appellants that the grantor by the term "heirs generally" meant "collateral heirs," but we find no warrant in the deed for so holding. The deed itself does not show that he used the language "heirs generally" in any other than its commonly accepted legal sense. To hold otherwise is to enter the field of speculation as to his intentions, which is not permissible. In giving construction to deeds we are confined to the terms of the instrument itself, the object being to ascertain the intention of the grantor as expressed by the language used, and not the unexpressed purpose which may at the time have existed in his mind. Where there is no ambiguity in the terms used, or where the language used has a settled legal meaning, the instrument itself is the only criterion of the intention of the party. (*Fowler v. Black*, 136 Ill. 363; *Bradish v. Yocum*, 130 id. 386; *Ballance v. City of Peoria*, 180 id. 29.) Anderson defines "heir general" as "he upon whom the law casts the realty of an intestate." (Anderson's Law Dic. p. 508.) Bouvier defines "heir general" as "heir at common law," and defines "heir at common law" as "he who is born or begotten in lawful wedlock, and upon whom the law casts the estate in lands, tenements or hereditaments immediately upon the death of the ancestor." (1 Bouvier's Law Dic. p. 746.) Again, "heir" is defined as "one who, upon

the death of another, acquires or succeeds to his estate by right of blood and by operation of law; he upon whom the law casts the estate immediately upon the death of the ancestor." (2 Blackstone's Com. p. 201.) In the Roman law and in the modern civil law "heir" has a more extended signification than in the common law. By it the term is applied to all persons entitled to succeed to the estate of one deceased, whether by act of the party or by operation of law. (9 Am. & Eng. Ency. of Law, p. 357.)

Adoption of children was a thing unknown to the common law but was a familiar practice under the Roman or civil law, and our modern statutes of adoption are taken from the latter, and so far modify the rules of common law as to the succession of property. The Illinois Statute of Adoption provides that "a child so adopted shall be deemed, for the purposes of inheritance by such child, \* \* \* and other legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock." It is not and could not be contended that if Adeline Gellatly had died intestate owning property in her own right, the appellee, her adopted child, would not have succeeded to her estate, under the Statute of Adoption, as her "heir general." The deed in question here, in the event of the failure of the first contingency, conveys the premises therein described, not to the heirs general of the grantor, but to the "heirs generally" of the grantee, Adeline Butterfield (Gellatly), and there being no language in the deed to indicate that the grantor used the words in any but their ordinary legal signification, "heirs generally" must be held to indicate the adopted child, Roy Gellatly,—the person upon whom the law, as now fixed by the legislature, has impressed the character of "heir" of Adeline Gellatly.

For the reasons indicated we think the circuit court committed no error in holding that appellee Roy Gellatly is entitled to the fee in the premises described in the

deed from Justin Butterfield to Adeline Butterfield, and in enjoining appellants and their co-tenants from claiming any right, title or interest in the premises, and its decree will accordingly be affirmed.

*Decree affirmed.*

Mr. JUSTICE MAGRUDER, dissenting:

I cannot concur in the reasoning of this opinion. If there is anything that is clear about the deed of Justin Butterfield to his daughter it is that he intended to draw a distinction between her children and her "heirs generally." "Heirs generally" was intended to mean something else than a child, and this intention is clearly manifested by the reference to George Butterfield, the grantor's son and the brother of Mrs. Gellatly. In default of "children" the "heirs generally" are to take. Clearly, the adopted son, Roy Gellatly, could not take as one of the "heirs generally." He could only take, if at all, as a child. The reference, in the use of the words "heirs generally," is manifestly to collateral heirs, the class to which Mrs. Gellatly's brother, George Butterfield, belonged. Roy Gellatly cannot be an heir of any kind, except so far as he becomes such by being an adopted child. If he was not a child, then Mrs. Gellatly died without children, and the "heirs generally" take, and he cannot be classed among them not being a child, and not being related in any way otherwise than by adoption. If the grantor did not intend to refer to an adopted child of his daughter as one of her children, then he could not by the same reasoning have intended to refer to such adopted child, as one of her "heirs generally." If no future act of adoption was within the grantor's contemplation, it was not so for the purpose of making such adopted child an "heir generally" any more than it was for the purpose of making him a "child."

Mr. CHIEF JUSTICE BOGGS: I concur in the dissenting opinion of Mr. Justice MAGRUDER.

JAMES F. CLANCY

v.

JOHN J. FLUSKY *et al.**Opinion filed October 19, 1900—Rehearing denied December 7, 1900.*

**SPECIFIC PERFORMANCE**—*when equity will enforce parol promise to convey farm.* A parol promise by a father to give a farm to his son if the latter would move upon and cultivate it and furnish a home for the father will be enforced by court of equity where the terms of the contract and compliance therewith by the son are proved, even though the father, without justifiable cause, left the home provided for him after several years, and conveyed the farm, without actual consideration, to one who had notice of the son's open possession under claim of ownership.

MAGRUDER, J., dissenting.

WRIT OF ERROR to the Circuit Court of McHenry county; the Hon. CHARLES E. FULLER, Judge, presiding.

BASTRUP & O'NEILL, for plaintiff in error.

JAMES F. CASEY, D. T. SMILEY, for defendants in error.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

In November, 1891, John Flusky commenced an action of forcible detainer against the defendant in error, John J. Flusky, to recover possession of a farm of two hundred and ninety-two acres in McHenry county. There was a judgment against John J. Flusky before the justice of the peace, and he appealed the cause to the circuit court. On July 25, 1892, said John J. Flusky filed his bill in said circuit court against said John Flusky and the plaintiff in error, James F. Clancy, to enjoin the action of forcible detainer and for a specific performance of an alleged oral contract for the conveyance to him of said farm. Complainant alleged that the defendant John Flusky was his father; that in September, 1887, said John Flusky agreed that if complainant would rent his own

farm and move upon the farm in question and cultivate and improve the same, and furnish a home to his said father as long as he should desire such home, he would convey the land to complainant; that complainant accepted said agreement and proposal, took possession, made improvements and performed the contract on his part; that said John Flusky resided with complainant, and he furnished him with board, lodging and care, until October, 1891, when he left complainant's home without cause, and that on July 29, 1892, said John Flusky made a conveyance of the land to James F. Clancy for the pretended consideration of \$10,000, while complainant was in open possession of the premises as owner of the same. John Flusky answered, denying that he was the father of complainant and denying the contract and making of improvements, and alleged that complainant moved upon the premises to assist in improving and tilling the same at complainant's own suggestion, for which he was to pay complainant a reasonable compensation, either in a share of the crops or otherwise; that he resided with complainant until he was compelled to leave on account of his treatment, and that he had conveyed the premises to the defendant Clancy for a good and valuable consideration. Clancy in his answer also denied the making of the contract and the making of improvements by the complainant, and alleged that he had paid \$10,000 for the property. Both answers set up the Statute of Frauds as a defense to the alleged oral contract. Replications were filed to the answers, and the cause was referred to a special master in chancery. The defendant John Flusky died in December, 1894, after a part of the testimony was taken. On October 25, 1897, defendant Clancy filed his cross-bill, alleging that his co-defendant, John Flusky, was dead, and that, not being a party to the forcible detainer suit, he could not obtain affirmative relief except by cross-bill. He prayed for a writ of restitution of the premises as grantee of John Flusky. John J. Flusky

answered the cross-bill, and a replication to the answer was filed. A special master reported in favor of complainant, finding that complainant was the legitimate son and only heir of John Flusky; that the contract was made and that complainant performed his part of it, except so far as prevented by John Flusky leaving his home without any reasonable cause. He recommended a decree setting aside the deed to the defendant Clancy as a cloud upon the title of complainant, and granting the relief prayed for in the original bill. The cause was heard on exceptions to the report. The first exception was that the master erred in finding that the complainant was the legitimate son of John Flusky, but this exception was afterward withdrawn, so that the finding of that fact cannot be questioned and is not open to further investigation. The court overruled the remaining exceptions, confirmed the report and entered a decree dismissing the cross-bill of Clancy and declaring complainant, John J. Flusky, the owner in fee simple of the premises.

On the question whether the alleged contract was made, the direct evidence consisted of the testimony of complainant and his daughter that it was made, and of the defendant John Flusky denying it and testifying that complainant moved upon the farm without any agreement of any sort. There was some evidence of admissions by the complainant that he went on the farm without any agreement, and these alleged admissions he denied. It was proved that after the complainant moved on the place the defendant John Flusky frequently said to different persons that the place and everything there belonged to complainant and that he had given the farm to him. Considering all the evidence and the attendant circumstances, we conclude that the facts established by the proofs are as follows: In September, 1887, John Flusky owned the farm in question and was living on it. He was eighty-seven years old. His wife was dead and he had no family. Mary Jane Flusky, a daughter of the

complainant, was keeping house for him. The farm was not in good condition, was unfenced and overrun with burrs and Canada thistles. At that time John Flusky proposed to complainant, who was living upon his own farm eight miles distant, that if he would move upon this farm and take possession of it and cultivate and improve it, and furnish said John Flusky a home with him, he would give complainant the farm. Complainant considered the proposition for about a week, when he accepted it and rented his own farm and moved on these premises in pursuance of the arrangement. He built necessary wire fences, did some ditching and put in tile, and put in a hydraulic ram to furnish water for the stock. He got the farm into a better state of cultivation and reduced the number of burrs and thistles upon it. He paid most of the taxes after he took possession. About the time complainant went on the farm John Flusky built a house upon it at a cost of about \$1500 and a barn that was worth perhaps \$3000. The parties lived together in the house and complainant furnished John Flusky a home and cared for him for about four years, until October, 1891, when he left without any justifiable reason. The parties were perhaps both inclined to be somewhat quarrelsome and they had minor troubles about various things, but there was no sufficient cause for leaving the place. After leaving the farm and bringing the suit in forcible detainer John Flusky made the conveyance to Clancy without any consideration. The improvements made by the complainant were not extensive, and the improved cultivation of the farm was only the result of good husbandry, but no great improvements were required. The father was in good circumstances and built the house and barn and was otherwise liberal with complainant, and among other things paid a mortgage of complainant amounting to \$2154.40. Complainant was in the open and visible possession of the premises, and Clancy had notice of his claims when he took the title.



In a suit for specific performance of an alleged contract to convey lands, such contract must be shown and its material terms must be proved. (*Wright v. Raftree*, 181 Ill. 464.) When the alleged contract is oral and the Statute of Frauds is pleaded, there must have been such performance as will take the contract out of the prohibition of such statute; but when a contract is proved, and it is founded upon a good and valuable consideration and has been performed by one party, a court of equity will decree its specific performance at the suit of such party. The complainant must show that he has done, and is ready and willing to do, all the things that are required of him by the agreement according to its terms; but if that is the case, he is entitled to have the other party perform his part of it. The contract in this case is not objectionable to the rules of equity, and the only question seems to be whether there was such performance by complainant that the Statute of Frauds will not bar the remedy. It has been repeatedly held that where a father gives land by parol to his son, and the son takes actual possession of the land under the agreement and in reliance upon it and performs his part of such agreement, a court of equity will enforce the promise. (*Kurtz v. Hibner*, 55 Ill. 514; *Langston v. Bates*, 84 id. 524; *Bohanan v. Bohanan*, 96 id. 591; *McDowell v. Lucas*, 97 id. 489; *Irwin v. Dyke*, 114 id. 302.) The circumstances of cases differ greatly, but we think this case comes fairly within the rule stated in these decisions, and that the court did not err in enforcing the contract.

Some objections are made to the procedure and the decree, but having disposed of the substantial merits of the controversy we do not regard such other objections of any importance, and the decree will be affirmed.

The decree of the circuit court is affirmed accordingly.

*Decree affirmed.*

MR. JUSTICE MAGRUDER, dissenting.

## THE WEST CHICAGO STREET RAILROAD COMPANY

v.

AUGUST TORPE, Admr.

*Opinion filed October 19, 1900—Rehearing denied December 7, 1900.*

EVIDENCE—when admission of evidence of custom of stopping street car at certain place is error. Where the vital point in controversy in an action against a street railway company is whether defendant's train which plaintiff's intestate attempted to board was running slowly or at full speed, upon which point the evidence is contradictory, it is prejudicial error to permit the plaintiff to show, in corroboration of his evidence that the train was running slowly, that defendant was accustomed to stop its trains or run slowly for the purpose of receiving passengers at the place of the accident.

MAGRUDER, J., dissenting.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. HENRY B. WILLIS, Judge, presiding.

JOHN A. ROSE, and LOUIS BOISOT, Jr., (W. W. GURLEY, of counsel,) for appellant.

DOUTHART & BRENDCKE, and VOLLMER & CAMELON, for appellee.

Mr. JUSTICE HAND delivered the opinion of the court:

This is an action on the case for negligence resulting in the death of appellee's intestate. Verdict of jury and judgment of the court thereon for appellee, appeal to the Appellate Court for the First District, judgment of that court affirming the judgment of the circuit court, and appeal from that judgment to this court.

The declaration consists of two counts. The first count alleges that while the deceased was mounted upon the step of a certain train of cars of the defendant, the defendant's gripman negligently started said train suddenly forward at a great and unlawful rate of speed, so

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that the deceased was thrown off and killed. The second count alleges that while the deceased was attempting to mount, and was mounting, the said train of cars, the defendant's gripman negligently started said train suddenly forward at a great and unlawful rate of speed, so that the deceased was thrown off and killed.

The evidence showed that the deceased met his death by being run over by one of the appellant's cable cars about six o'clock P. M., December 17, 1894, on West Madison street, in the city of Chicago, between Rockwell street and Campbell avenue, a short distance east of appellant's power house. West Madison street runs east and west, having on it a double street car track. The car that ran over the deceased was eastward bound, and was the rear trailer of a cable train consisting of a grip car and two trailers. The testimony on behalf of appellee tended to show that the train in question slowed up in order to receive the deceased as a passenger; that thereupon he stepped with one foot upon the lower step of the car, holding onto the car with both hands; that before he could fully mount the car the train suddenly started with a jerk, throwing him off, so that he was dragged under the car feet first, run over and killed. The testimony for appellant tended to show that the deceased attempted to catch hold of the first trailer as it passed him at full speed in the middle of the block, fell head foremost in front of the last trailer and was run over and killed.

On the trial of this case appellee introduced, over appellant's objection, evidence tending to show that appellant had a custom of stopping its cars near the point where appellee's intestate was killed, for the purpose of taking on passengers. Appellant assigns as error the admission of such testimony, and relies solely upon such assignment for a reversal of this case.

The main controversy on the trial in the court below was over the rate of speed at which the train which

passed over the deceased was going at the time he attempted to mount the same. A number of witnesses testified on behalf of appellee that the same was moving very slowly at that time, while a number testify on behalf of appellant that the same was moving very rapidly and at full speed. All agree that it was moving. The rapidity with which such cars were moving at the time the deceased undertook to mount the same was important. To permit the appellee to corroborate the testimony of his witnesses who had testified upon that issue, by proving that at other times the trains of the appellant ran slowly or stopped at this particular point for the purpose of receiving passengers, is, in our judgment, prejudicial error.

The case of *Chicago, Burlington and Quincy Railroad Co. v. Lee*, 60 Ill. 501, is an action on the case, wherein the negligence alleged was the failure to ring the bell or sound the whistle as the train approached the crossing where the injury took place. In order to show such failure, evidence was introduced that trains had at other times passed that crossing without ringing a bell. This court held such evidence wrongly admitted, and say (p. 504): "From the fact of omitting to ring the bell at any previous time no reasonable inference could be drawn that it was not rung on the occasion in question." A vital point in issue in that case was whether there was a failure to ring the bell at the time of the injury. The vital point in issue in this case is the rate of speed at which the cars were going at the time the deceased attempted to mount the same. If, as the witnesses for appellant testify, the cars were going at a full rate of speed when the deceased attempted to mount the same, this testimony could not be legitimately overcome by testimony that cars passing this place on the day previous, or at some other time, stopped or ran slowly.

In the case of *Peoria and Pekin Union Railway Co. v. Clayberg*, 107 Ill. 644, which was an action on the case

for negligence resulting in the death of the plaintiff's intestate, the defendant sought to show that at the time of the injury the deceased was not observing due care for his own protection, by proving that before that time he was in the habit of jumping on trains. The court held such evidence inadmissible, and say (p. 649): "No authority is referred to sanctioning the admission of such evidence, and we are not aware of any. Its effect is clearly to raise a collateral and immaterial issue. If such evidence is admissible to prove negligence on the part of the plaintiff's intestate, then the same character of evidence must be admissible to prove negligence on the part of the defendant, which has been condemned by the entire weight of judicial authority."

It is contended that such evidence was proper and material to be considered by the jury in determining whether or not, in view of the conflict in the evidence, the particular train of appellant moved slowly or rapidly at the time in question. That was one of the issues being tried. Witnesses who saw the train at the time of the injury had testified with reference thereto. There was a conflict upon that proposition, and we are unable to see how testimony of the manner in which trains were handled at this particular place at other times tended legitimately to show the manner in which the particular train by which the deceased was injured was handled at the time of the injury.

It is further suggested that the testimony is proper as tending to show that appellant was accustomed to slow up or stop its trains at that point, and that there was evidence in the record from which it might be inferred that deceased knew of such custom. If it were admitted that such custom did exist and the deceased knew the same, such facts would not justify the deceased in attempting to mount a cable train running at full speed past said point, even though the same was so run in disregard of such custom.

We are of the opinion that the only effect of this testimony upon the minds of the jury was to lead them to believe that if the trains of appellant were stopped or run slowly at other times at the place where the injury took place, such facts were proof of the rate of speed at which such train was running at the time deceased attempted to mount the same and was killed. We are of the opinion the same was not proper evidence and that the court erred in admitting the same.

The judgments of the Appellate and circuit courts are reversed and the cause is remanded to the circuit court for another trial consistent with this opinion.

*Reversed and remanded.*

Mr. JUSTICE MAGRUDER, dissenting:

I think that the judgment of the Appellate Court ought to be affirmed, and that that court correctly disposed of the questions involved, as will appear from the following extract from its opinion, to-wit:

"The evidence on the question of care on the part of deceased and the negligence of appellant is conflicting. We are of opinion, from a careful reading and consideration of the evidence, in the light of the arguments of counsel, that there was sufficient proof to justify the submission of the case to the jury under the second count of the declaration.

"There is evidence tending to show that deceased signaled the gripman to stop the train at a time and under circumstances when he must have seen the signal; that the train was slackened in its speed, one of the witnesses testifying that it was going very slow, and another that it was coming near a stop and was going very slow, and another that the train was just moving; and that the gripman, just as deceased was in the act of getting upon the step of the car, suddenly and violently started the train forward at a great rate of speed, one of the witnesses testifying that the car gave a lunge ahead just as

deceased went to get on,—when he had one foot on the step and had hold of the car with each hand; another witness testifying that upon a quick signal given by the conductor, when the car was going very slow, the car lunged forward; and still another, that as the car came near a standstill deceased took hold of the handle-bar on the front end of the first trailer, the car was then signaled by the conductor to go ahead, when the gripman started the car with such force that the man's foot slipped off the step right around against the side of the car, and also that when the signal was given the car 'lunged right forward and it jerked him off.'

"It is true the evidence on behalf of appellant tends to show that deceased attempted to get upon the moving train while it was going at the rate of seven or eight miles per hour; that he gave no signal to the gripman; that there were signals given by both whistle and bell for the train to move forward, and that the gripman did not see the deceased when he attempted to board the moving train. But these matters were all peculiarly for the consideration of the jury, and we cannot say, after a careful reading and consideration of the evidence, that it shows either that the deceased was guilty of contributory negligence or that it fails to show negligence on the part of appellant's gripman which would justify the verdict of the jury.

"The fact that deceased attempted to board the train while it was moving slowly, as the witnesses for appellee say, does not, as matter of law, show a want of ordinary care. Whether there was such want of ordinary care was for the jury. (*Cicero and Proviso Street Railway Co. v. Meixner*, 160 Ill. 320; *North Chicago Street Railroad Co. v. Wiswell*, 168 id. 613; *North Chicago Street Railroad Co. v. Williams*, 140 id. 275; *Springfield Consolidated Railway Co. v. Hoeffner*, 175 id. 634).

"If appellant's gripman slowed up his train, and then when deceased attempted to board it the gripman started

up with a jerk or lunge, as the witnesses testify, and when he knew that deceased was in the act of getting on, it would be negligence for which appellant would be liable. (*Meixner case, supra*; *West Chicago Street Railroad Co. v. Manning*, 170 Ill. 417; *Hoeffner case, supra*).

"The evidence which it is claimed the court erred in admitting is of a custom or habit of appellant of stopping its trains at or near the place of the accident. The contention is, that as the evidence did not show that deceased knew of such custom, it was incompetent and prejudicial error. We think this contention is not tenable, and that the evidence was proper and material to be considered by the jury in determining whether or not, in view of the conflict in the evidence, the particular train of appellant moved slowly or rapidly at the time in question; and besides, there was evidence from which it might have been inferred deceased knew of such custom.

"The only other matter of procedure of which complaint is made was as to the admission of the testimony of a witness who testified as to this custom, and admitted, on cross-examination, that he did not know whether or not the cars stopped always or only when they were ahead of time, there being a motion by appellant, after the cross-examination, to strike out the evidence of the witness. We think there was no error in this regard. The evidence tended to prove that there was such custom, if the trains stopped at this place when they were ahead of time.

"The judgment of the circuit court is affirmed."

In addition to what is said above, it may be observed that the opinion of the majority in this case is in direct conflict with the recently decided case of *North Chicago Street Railroad Co. v. Kaspers*, 186 Ill. 246.



CHARLES NETTERSTROM *et al.*

*v.*

WALTER S. KEMEYS *et al.*

*Opinion filed October 19, 1900—Rehearing denied December 6, 1900.*

1. TAX CERTIFICATES—*effect of section 211 of Revenue act, concerning purchaser's suffering re-sale of property.* Section 211 of the Revenue act, providing that if the purchaser at a tax sale suffers the property to be again sold for taxes before the expiration of the last day of the second annual sale thereafter he shall not be entitled to a deed until the expiration of a like term from the date of the second sale, operates to extend the life of his certificate during the added period.

2. SAME—*when priority of tax sale certificates as liens is not lost.* The priority of tax sale certificates as liens upon property covered by a trust deed is not lost by their unauthorized delivery to the trustee, without consideration, by the party who was holding them in trust for the purchasers under a written agreement providing that the holder should deliver them to the trustee, or any one named by him, upon the payment of the amount paid therefor, with interest.

*Kemey v. Netterstrom*, 86 Ill. App. 590, reversed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. ELBRIDGE HANEY, Judge, presiding.

CHYTRAUS & DENEEN, and CHARLES H. HAMILL, for appellants.

BAYLEY & WEBSTER, for appellees.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This is a proceeding in chancery, in the Cook circuit court, to foreclose three trust deeds made by William Kinsella to Edwin F. Bayley, as trustee, (known in this cause as the Bayley trust deeds,) owned by appellees, to satisfy a debt of \$7500 secured thereby. Appellants, Netterstrom and Vider, were made parties defendant to the bill, with the allegation that they claimed some interest in the lands conveyed by the instruments in ques-

tion, and after answering they filed a cross-bill, seeking to foreclose as a junior mortgage a quit-claim deed to one Lindsten, absolute on its face, conveying the same lands, and also seeking to have certain tax certificates which had been purchased by appellants for the taxes of 1893, amounting to \$1345.72, declared a lien prior to that of the Bayley trust deeds. The master to whom the cause was referred reported adversely to the cross-complainants in respect to their claim of priority over the Bayley trust deeds for the amount paid by them for the tax certificates, and recommended that the court deny the prayer of the cross-bill in such respect. The circuit court, however, sustained exceptions to the master's report and rendered a decree according to the prayer of the cross-bill. Upon appeal to the Appellate Court for the First District the decree below was reversed and the cause was remanded, with directions to the chancellor to deny the prayer of the cross-bill in so far as it asks a priority of lien over the Bayley trust deeds and to enter a decree according to the prayer of the original bill, as recommended by the master. Appellants now bring the cause to this court upon further appeal.

Here, as in the Appellate Court, the questions raised relate wholly to the propriety of the decree in so far as it gives a priority of lien to the cross-complainants for the amount expended for the tax certificates. These certificates were originally held by one Johnson, who, it appears, at the sales for delinquent taxes, annually, purchased lands in which Bayley was interested, and who had an agreement with Bayley, (who was not only the trustee named in the trust deeds but also the agent of the parties loaning the money,) not to part with the certificates to any third party without Bayley's consent. Netterstrom and Vider, the cross-complainants, became connected with Kinsella's affairs after the making of the Bayley trust deeds, by reason of their having to pay the whole of a judgment rendered against them jointly, Kin-

sella being at the time unable to pay his portion of the same. After some negotiation it was arranged that Netterstrom and Vider should lend to Kinsella an amount about equal to his share of that judgment, and take as their security his equity in the real estate covered by the Bayley trust deeds, and other lands. At first it was thought the amount necessary to be advanced by Netterstrom and Vider for this purpose would not exceed \$2000, but it was afterwards arranged that these tax certificates should also be taken care of, and thereupon \$4000 was agreed upon as the sum to be advanced. To secure this amount the above mentioned quit-claim deed was made by Kinsella to Lindsten, who afterwards executed a declaration of trust setting forth that he held the title for certain trust purposes. Out of the \$4000 thus advanced, one Anderson, acting for Netterstrom and Vider, took up the tax certificates, with the consent of Bayley. At the time they were placed in Anderson's hands, a memorandum of contract, in the form of a letter, was drafted by Anderson and signed by him, being dictated by Bayley, setting forth the conditions under which the former was to hold them, as follows:

*"Mr. Edwin F. Bayley:*

*"CHICAGO, April 1, 1895.*

*"DEAR SIR—I hold tax certificates for the tax sale of 1893, purchased by a client of mine from William H. Johnson, for the sum of \$1345.72, to the following described property, (describing the premises). For valuable considerations moved from you to me, for the benefit of my said client, I hereby agree that if said certificates of sale shall not be canceled of record on or before July 1, 1895, to sell the same to you, or any person upon your order, for the amount above paid to Mr. Johnson, with interest thereon at the rate of six per cent per annum from this date until the time of such sale to you or order. I further agree that this option to you or your order to purchase said tax certificates may remain open for sixty (60) days next after the said first day of July, 1895.*

*H. H. ANDERSON."*

Some time in the summer of 1895, the time not being definitely fixed, Anderson, contrary to the provisions of

this memorandum and without receiving any consideration for them, delivered the certificates to Bayley, where they continued to remain until this suit was brought.

The contention on the part of appellees is, that the appellants, as junior mortgagees, simply took up the tax certificates and held them temporarily, and that they were afterwards permitted to become void by lapse of time and were then surrendered by Anderson to Bayley, thereby being, in effect, canceled; while, on the other hand, it is urged by appellants that they were not to be canceled, but to be kept alive and held by Anderson as a security for the money advanced by appellants, and that Anderson, by mistake (he, in fact, thinking they were void,) or without authority, delivered them to Bayley, receiving no compensation or consideration therefor; that after discovering they were valid, he, Anderson, made a demand of Bayley for them, but the latter refused to return them; that they are still valid liens upon the premises and should be decreed a priority over the Bayley trust deeds.

It clearly appears from the foregoing memorandum that Anderson was to be the holder of the certificates, and that upon the payment of certain sums of money he might sell the same to Bayley, or any person upon his order. It is not contended that Bayley, or the persons for whom he was acting as trustee, paid anything for the certificates when delivered to him by Anderson, yet they claim that by reason of his holding them their priority of lien is destroyed, it being conceded that if outstanding they would be prior liens to the Bayley trust deeds. The controlling question of fact in the cause is whether or not, when Netterstrom and Vider advanced the money for the certificates, it was intended they should be canceled or be kept alive. We think the evidence clearly establishes the latter view.

The next consideration is, what was the legal effect of the surrender of the certificates to Bayley by Ander-

son? It is clear they were valuable liens upon the property. The contention that they were without force as such, because the time had expired when notices should have been served in order to entitle the holder to take out a tax deed, is not well founded. The lands covered by the certificates in question were again sold for taxes for the year 1894. The statute provides that if the purchaser of real estate sold for taxes shall suffer the same to be again sold for taxes before the expiration of the last day of the second annual sale thereafter, such purchaser shall not be entitled to a deed for such real property until the expiration of a like term from the date of the second sale, during which time the lands shall be subject to redemption upon the terms and conditions theretofore described. (Hurd's Stat. 1897, sec. 211, p. 1351.) By this statute there was an extension of the life and vitality of the certificates until the fall of 1897, by reason of the re-sale in 1895. The certificates, then, being of value, and being surrendered by Anderson, the holder, by mistake or without authority and without consideration, upon what principle can it be said appellants shall, by reason of that surrender, suffer loss?

It is said that Bayley himself thought the certificates valueless; that they were so in fact, because it could not be foretold whether the lands would be again sold for taxes, and that in taking them he was perpetrating no fraud or deception upon Anderson. It may be conceded that Bayley acted in the utmost good faith when he received them, yet the fact remains that they were of value, and when he subsequently learned that fact, and having knowledge that Anderson had no authority to surrender them, he refused to return them upon demand. If the certificates had been surrendered to Bayley by the appellants themselves, or by some person with their consent, a different question would be presented; but here the certificates were in the hands of Anderson, who was holding them, it seems, for all parties, in trust for a spe-

cific purpose, and this trust relation was known to Bayley. In surrendering them Anderson acted beyond his authority, and neither Bayley nor his principals can be permitted to profit by an act of the trustee known to be beyond his authority. According to the strict letter of the memorandum above set forth, Bayley was only to get the certificates upon paying for them. Equity demands that he place them back in the hands of the trustee and that they be treated as having remained in his hands, the owners, the appellants, for whose benefit they were to be held, to be given the benefit of all rights which they originally had thereunder.

To the extent of the amount paid for the tax certificates we think the equities of this case are with the cross-complainants, and that the decree of the chancellor was right.

The judgment of the Appellate Court will be reversed and the decree of the circuit court affirmed.

*Judgment reversed.*

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THE CHICAGO TITLE AND TRUST COMPANY, Exr.

v.

THE TOWN OF LAKE VIEW.

*Opinion filed October 19, 1900—Rehearing denied December 6, 1900.*

The constitutionality of the Park act and its amendments was established in *Hundley v. Commissioners of Lincoln Park*, 67 Ill. 559, and *Jones v. Town of Lake View*, 151 id. 663, and the decisions in those cases are conclusive of the questions here involved.

APPEAL from the County Court of Cook county; the Hon. JOHN H. BATTEN, Judge, presiding.

EDWARD ROBY, for appellant.

EDWARD O. BROWN, and JAMES MCCARTNEY, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

By this appeal the appellant, as the executor of Parker R. Mason, deceased, seeks to reverse, as to a certain lot owned by him, a judgment of the court below confirming a special assessment levied to pay the cost of opening and improving a public highway along the shore of Lake Michigan, known as the "Lake Shore Drive."

Assessments upon other property under the same petition for the same improvement were reviewed by this court in *Jones v. Town of Lake View*, 151 Ill. 663, in which case many of the questions involved in this appeal were decided and to which reference is made for a more particular statement of the proceedings. The lot or piece of land involved was finally adjudged to be the private property of Parker R. Mason, in *Mason v. City of Chicago*, 163 Ill. 351, and after that decision the property was included in the assessment roll, and Mason, having been notified, appeared and filed his objections to confirmation. Pending the proceeding he died, and appellant, his executor, was substituted. Under the first ten objections the legal sufficiency of the proceedings was attacked: First, the constitutionality of the several statutes under which the proceedings were taken; second, the validity of the order or ordinance authorizing the assessment; third, compliance with law in the steps taken to levy the assessment. The eleventh objection made the issue, tried by a jury, that the property was assessed more than it was benefited and more than its proportion of the cost of the improvement.

In the first place, it is contended that the several statutes relating to parks, in pursuance of which the proceedings were taken, are unconstitutional and void,—that is to say, that the act entitled "An act in regard to the completion of public parks and the management thereof," approved June 16, 1871, (Laws of 1871-72, p. 587,) and the several acts amendatory thereof, subsequently passed,

are each and all in conflict with the constitution, and void. What was said in *People ex rel. v. Mayor*, 51 Ill. 17, to the effect that some of the sections of the original act of 1869 there referred to more specifically, were in contravention of the constitution of 1848, in nowise affects the validity of any provision of the statute involved in this case. The act of 1871 was held constitutional in *Hundley v. Commissioners of Lincoln Park*, 67 Ill. 559; and in *People ex rel. v. Gage*, 83 Ill. 486, it was said: "It is unnecessary to argue upon the constitutionality of the park acts. That has been settled by the case of *Hundley v. Commissioners of Lincoln Park*, *supra*." And in *Jones v. Town of Lake View*, *supra*, the amendatory acts were considered. We are asked to review and overrule all of these cases and to declare this park legislation void under the constitution, and, consequently, that the assessment upon the lot in question was without authority of law. We think it unnecessary to follow counsel in his elaborate argument upon these questions. They are settled, and should remain so. So, also, is the point made, that the supervisor and assessor of the town of Lake View were not the corporate authorities of that town and therefore had no authority to make the assessment. That question was expressly decided adversely to appellant's contention in the *Jones case*, *supra*. The proceedings in that case were substantially the same as in this, and they were there held legally sufficient.

Under the eleventh objection the jury found that appellant's lot was not assessed more than it would be specially benefited by the improvement nor more than its proportionate share of the cost thereof, and we think the evidence sustains the finding.

The judgment must be affirmed.

*Judgment affirmed.*



C. O. OVERLAND *et al.*

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

*Opinion filed October 19, 1900—Rehearing denied December 6, 1900.*

This case is controlled by the decision in *Noel v. People*, (*ante*, p. 587).

WILKIN, J., dissenting.

APPEAL from the Criminal Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding.

HENRY C. NOYES, for appellants.

CHARLES S. DENEEN, State's Attorney, (FRED L. FAKE, GABRIEL J. NORDEN, and KITT GOULD, of counsel,) for the People.

Per CURIAM: The appellants, who were engaged in the retail grocery business in Chicago and were not registered pharmacists, were in the criminal court of Cook county found guilty of violating section 2 of the Pharmacy act in selling proprietary medicines at retail, and were fined \$20 and costs. Upon this their appeal to this court they assign for error that the statute under which they were convicted is unconstitutional and void.

Except as to the form of proceeding in which it is raised, the question is the same as that raised and decided in *Noel v. People*, (*ante*, p. 587,) and must be decided in the same way. It was there held that so much of the statute as prohibited the act involved in that case (which was of the same character as the one involved in this) was unconstitutional. The ruling in that case is conclusive of this, and the judgment must be reversed.

*Judgment reversed.*

Mr. JUSTICE WILKIN, dissenting.

C. S. YOUNG  
v.  
THE WELLS GLASS COMPANY.

*Opinion filed October 19, 1900—Rehearing denied December 6, 1900.*

**EVIDENCE**—*when architect's certificate of damages is not admissible—arbitration and award.* An architect's certificate of damages, based upon matters outside the contract and upon the *ex parte* statements of the owner without notice to the contractor, is void as an award of damage, and is not admissible in evidence in an action for the balance due under the contract.

*Young v. Wells Glass Co.* 87 Ill. App. 537, affirmed.

**APPEAL** from the Branch Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOHN BARTON PAYNE, Judge, presiding.

The appellee brought its suit in assumpsit in the superior court of Cook county against the appellant and others, as partners, under the firm name of C. S. Young & Co., to recover \$3000 and interest thereon, claiming that amount as the balance due of the contract price for the manufacture of a miniature building in glass, and its erection in the Iowa State building at the World's Columbian Exposition, in 1893.

The allegations of the declaration and the evidence show that in December, 1892, C. S. Young & Co. and the Iowa Columbian Commission, a corporation of the State of Iowa, entered into a written contract, by which Young & Co. obtained an allotment of space twenty-three feet and eight inches by twenty feet in the Iowa State building at the exposition to erect a miniature building in glass, as nearly as possible a model of the Iowa State capitol building, for an exhibit of the grains and seeds of the State of Iowa. This glass model for such exhibit was to be constructed according to plans and specifications of M. E. Bell, architect, and under his direction,

and was to be completed in the space assigned by April 1, 1893. Young & Co. were to gather and exhibit the seeds, but the miniature building was to remain in the Iowa building during the exposition, and was to be the property of said commission and subject to its disposition and control. Young & Co. gave bond to the commission for the faithful performance of the contract on their part. Afterwards, on December 20, 1892, the Wells Glass Company, a corporation, and C. S. Young & Co., entered into a written contract, by which the glass company agreed to manufacture the glass building and to erect the same in said Iowa building according to the plans and specifications of M. E. Bell, architect, for the price of \$4500,—\$1500 of which was to be paid by the conveyance to appellee of ten lots,—and to complete the same by the first day of April, 1893, and that for each and every day after that date that the work should remain incomplete or in an unfinished condition, it, the glass company, would forfeit to Young & Co. \$200, which, using the language of the contract, "shall be deducted from the contract price as liquidated damages and not as penalty, said damages to be determined, defined and settled by M. E. Bell, architect, whose decision shall be final and without recourse."

When the first day of April came the glass company had not erected the glass model in the Iowa State building, and could not then, and for a number of weeks thereafter could not, proceed to do so because the decorators and finishers had not completed their work on the State building, and kept and maintained their scaffolding in such a way as to obstruct the space where the miniature building was to be placed. On March 31,—the day before the model was to be completed and erected,—C. S. Young & Co. wrote the glass company that they expected it, the company, to comply with the contract and to finish the model by the first day of April, unless the company could make some arrangement with the Iowa commission

for an extension of time, as they, Young & Co., were under like contract with the commission, and would hold the glass company responsible for any damage caused by failure to fulfill the contract; and on April 3 C. S. Young wrote the glass company to get prices for which its photographer would take photographs of the building, and to notify him when the building would be ready to photograph, and added: "I don't think you can figure on any longer time than the middle of April, though, of course, if you have made any arrangements with the Iowa commission you know how that is."

This building,—that is, the model in glass,—was erected and finished about June 3, 1893, and was accepted and approved by the architect. On June 7, at a meeting of the Iowa commission, that body adopted a resolution that C. S. Young & Co. be notified that the model erected by the glass company had been completed and was satisfactory to the commission, and on the next day a copy of the resolution was sent to them, C. S. Young & Co., by the secretary. On June 12 the architect notified the glass company that he had appeared before the Iowa commission, and reported his acceptance of its work in erecting the model. Prior thereto the architect had issued two certificates, to the effect that the glass company was entitled to certain payments on account of the work, but C. S. Young & Co. refused to pay anything, on the alleged ground that the model had not been completed within the time agreed upon and they had for that reason been deprived of the opportunity of photographing it, and had on that account lost the profits they would have realized on the sale of the photographs. They did, however, on June 29 convey the ten lots as they had agreed. Afterward they applied to the architect and obtained from him a statement in writing, certifying that he had estimated the actual losses sustained by C. S. Young & Co. on account of the non-fulfillment of the contract with the glass company at not less than \$3500. This certificate

was offered in evidence by Young & Co. as a defense to appellee's suit, but was excluded from the jury by the court. No other evidence of any damages sustained by the defendant below was offered.

Counsel for appellee moved the court to instruct the jury to find a verdict for the plaintiff for \$3000 and interest thereon, and counsel for the defendant asked the court to instruct the jury to find a verdict for the defendant. The court granted the motion of the plaintiff, and gave to the jury this instruction: "The jury are instructed to find for the plaintiff the sum of \$3945," and the defendant excepted. Judgment was rendered on the verdict, and the defendant C. S. Young appealed to the Appellate Court. That court affirmed the judgment, and Young took his appeal to this court.

JAMES H. TELLER, for appellant.

HENRY W. WOLSELEY, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

Many imperfections in the record in this case have been pointed out, which, the appellee insists, should preclude appellant from having the benefit of the errors which he has assigned, but we prefer to rest our decision on the merits of the case as it was presented to and decided by the court below. The suit was to recover the balance of \$3000 and interest claimed to be due on the contract. Appellant, or the firm of which he was a member, had, by the conveyance of the ten lots, paid \$1500 of the contract price, thus leaving the balance of \$3000 unpaid. The appellant, who was the only member of C. S. Young & Co. who appeared or was served, sought, by way of recoupment under the general issue, to defeat the recovery of the whole of this balance by proof that appellee failed to comply with its contract to complete the miniature building by the first of April, 1893, and

that C. S. Young & Co. had by such failure sustained damages in excess of such balance.

The first question necessary to consider arises on the exception of appellant to the ruling of the court in refusing to admit in evidence before the jury the certificate or written statement of the architect purporting to fix the amount of damages sustained by C. S. Young & Co. on account of appellee's failure to complete the model by April 1, 1893, at \$3500. Appellant's contention was, and is, that the parties had by the contract made the architect the sole arbiter of those damages and his decision final and conclusive upon both parties, and that it was serious error to exclude from the jury the written conclusion and decision of the architect on that question. Conceding, as contended by appellant, that the amount of \$200 per day to be forfeited to C. S. Young & Co. by appellee for each day's delay in completing the model after April 1, and to be deducted from the contract price, was to be considered as liquidated damages and not as penalty, the only question left for the architect to decide was the number of days' delay to be charged up to appellee. It appeared, however, from the evidence, that the architect had based his decision on the *ex parte* statements of appellant as to the profits which his firm would have realized from the sale of photographs if the model had been completed by the time specified in the contract. While the contract did provide that the damages should be "determined, defined and settled" by the architect, still, as the character, nature and amount of such damages had been liquidated by the parties themselves in the contract and fixed at so much per day, the architect's power to determine, define and settle the damages was confined to the question of the number of days for which appellee should be charged \$200 per day. His own testimony shows that such was not the basis of his estimate. It appeared, also, that nearly two months prior to the making of this certificate he had accepted the model as

complete and satisfactory under the contract and had issued certificates that appellee was entitled to receive \$2000, and stating the balance as \$1000 and ten lots, which constituted the whole of the contract price, and had made no deduction whatever for damages, as provided by the contract, and that he afterward made his estimate of damages without the knowledge of or any notice whatever to appellee. The architect was not authorized by the contract, or otherwise, to make his decision as to damages to be allowed to C. S. Young & Co. on *ex parte* statements of Young and without notice to appellee, and the court properly held his certificate of damages void and not admissible in evidence. In *Ingraham v. Whitmore*, 75 Ill. 24, this court said (p. 31): "The doctrine is well established that where an arbitrator proceeds entirely *ex parte*, without giving the party against whom the award is made any notice of the proceeding under the submission, the award is void, and it is not necessary to show corruption on the part of the arbitrator." See, also, *Vessel Owners' Towing Co. v. Taylor*, 126 Ill. 250; 2 Am. & Eng. Ency. of Law, (2d ed.) 650.

It is to be observed that the architect's decision was not arrived at from the contract and matters within his own knowledge, but in part, at least, outside of the contract and from statements of one, only, of the parties. If it were held that his decision amounted only to a determination of the number of days' delay for which appellee should pay the stipulated damages of \$200 for each day, still, appellee had the right to have considered the letters which it had received from appellant and his firm, and upon which it had the right to rely, referring appellee to the Iowa commission for authority to extend the time for the completion of the model. These letters tended to prove that such delays and extensions as were satisfactory to the commission would be satisfactory to Young & Co., as Young & Co. were under contract with the commission to have the model finished and in place

on the same date,—that is, on April 1. It would seem that the architect did not know of these letters, or else he ignored them. Appellee was entitled to the benefit of them. Besides, the evidence tended strongly to prove that the delay was caused by the commission itself in keeping the space allotted for the erection of the model obstructed by its own workmen.

We have not thought it necessary to consider whether or not C. S. Young & Co. in obtaining, and the architect in making and issuing, this certificate in the manner in which it was obtained and issued, exercised good faith, for that was a question for the jury, and does not, perhaps, arise here, where the court instructed the jury to find for the plaintiff. But the other questions are referred to as showing the importance of notice to appellee before the damages were fixed by the architect. There was no error in refusing to admit in evidence this void certificate of damages.

The next question is, did the court err in instructing the jury to find for the plaintiff the unpaid balance of the contract price? As the evidence then stood, the jury would not have been justified in finding that there was any delay of appellee in completing its work, except such as was satisfactory to or caused or authorized by the commission, to whom it had been referred by Young & Co. as having power to extend the time. The jury were, under the evidence then before them, bound to find for the plaintiff the amount due under the contract, as there was no evidence upon which to allow any damages to the defendant. Any other verdict would necessarily have been set aside. Indeed, no error was assigned in the Appellate Court, nor has been in this court, that the amount of the verdict was excessive.

The judgment of the Appellate Court affirming the judgment below is affirmed.

*Judgment affirmed.*



FRANCIS E. CROARKIN

v.

ELEANOR HUTCHINSON.

*Opinion filed October 19, 1900—Rehearing denied December 7, 1900.*

**CREDITOR'S BILL**—*what sufficient to sustain decree for complainant on creditor's bill.* A decree for the complainant in a creditor's bill proceeding seeking to have certain shares of hotel stock, held in the name of the judgment debtor's wife, decreed to be the property of her husband, should be sustained under evidence that the hotel furniture and fixtures, transferred to the hotel company, upon its incorporation, as payment for the stock, was the accumulation of the joint efforts of both husband and wife for a number of years, and that suit to recover the indebtedness due from the husband to complainant was pending when the stock was issued to the wife.

*Hutchinson v. Croarkin*, 87 Ill. App. 557, reversed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. W. CLIFFORD, Judge, presiding.

WILLIAM A. DOYLE, (FRANCIS E. CROARKIN, of counsel,) for appellant.

ELMER D. BROTHERS, (LUTHER LAFLIN MILLS, of counsel,) for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This is a creditor's bill by Francis E. Croarkin, the appellant here, filed in the circuit court of Cook county in August, 1896, to reach certain stock in a corporation known as the Oakland Hotel Company, originally issued to Eleanor Hutchinson, alleged to belong to her husband, Joshua Hutchinson, and subject it to the payment of a judgment of \$500 against him in favor of appellant, rendered in the Cook circuit court in January of that year. The principal theory of the bill is, that in the formation of this corporation the stock, although issued to the wife,

was paid for with the assets of the business of the Gresham Hotel, belonging, in part, to the husband, and that its issuance in this manner was in fraud of his creditors.

Upon a hearing below the chancellor found that Joshua H. Hutchinson and Eleanor Hutchinson were in partnership, and each had an equal share and owned and possessed the Gresham Hotel business and property; that J. H. Hutchinson was entitled to and owned one-half the stock of the Oakland Hotel Company; that said claim of complainant existed prior to December, 1891, and he was a creditor at the time of said conveyance of the assets of the Gresham Hotel; that said transfer was made by Joshua H. Hutchinson to hinder and delay his creditor, Croarkin; that Joshua H. Hutchinson is the owner of 297 shares of stock of the Oakland Hotel Company now in the hands of Eleanor Hutchinson, and that Croarkin is entitled to have the same sold to satisfy his judgment, interest and costs. It was decreed that Eleanor Hutchinson endorse over, deliver and assign to Thomas Taylor, Jr., the said 297 shares of stock, to be assigned by him to the purchaser or purchasers after sale of the same as therein provided. The decree concludes with an order for the sale of the stock, directing the application of the proceeds. The cause was appealed to the Appellate Court for the First District, where the decree below was reversed and the cause remanded, with directions to dismiss the bill. The judgment debtor having obtained from that court a certificate of importance, Croarkin prosecutes this appeal.

The only question below, and here, is one of fact, namely, whether or not a part of the stock of the Oakland Hotel Company, when that corporation was organized, in 1894, belonged, in equity, to Joshua Hutchinson. From the evidence it appears that appellee, for several years prior to her marriage with Joshua Hutchinson, was engaged in conducting a boarding house at No. 2256 Wabash avenue, Chicago, and owned a stock of hotel fix-

tures of the value of about \$1800, encumbered by a small chattel mortgage. In 1885 she and Mr. Hutchinson were married, and thereafter the boarding house business was enlarged, from time to time, by renting adjoining buildings, and it came to be known as the Gresham Hotel. In May, 1894, they opened up the Oakland Hotel and transferred to it all the fixtures, furniture, etc., except the carpets, formerly used in the Gresham Hotel. Later they organized the corporation known as the Oakland Hotel Company, and the furniture, fixtures, etc., were turned over to it, amounting in value to about \$15,000. The capital stock of the corporation was fixed at \$15,000, in shares of \$25 each. Five hundred and ninety-five shares were issued to appellee and one to her husband.

At the time of their marriage the husband was in the employ of Carson, Pirie, Scott & Co. at a salary of \$20 per week, and continued to hold this position until about 1890. Up to 1894 it is apparent the husband and wife were jointly engaged in the boarding house and hotel business, although the husband was a part of the time also engaged in other enterprises. The money received from the hotel business, and his salary, seem to have been kept in one account and as a common fund. He was joined as one of the lessees of the premises occupied in the business, and up to the date of the organization of the corporation gave his time and attention to the business, he and appellee living in the usual manner of husband and wife, each apparently working for the success of a joint enterprise. Although the wife testifies that the husband never had any interest in the hotel business, we think such statement is at variance with the facts detailed even by her.

When the corporation was organized the husband was indebted to the appellant and a suit was then pending against him, which was afterwards reduced to the judgment of \$500 before mentioned. This indebtedness existing at the date of the transaction seems to furnish the

only explanation as to why substantially all of this stock was issued to the wife, rather than a considerable portion of it to the husband. Invested in this hotel business was an accumulation of property, the result of their joint efforts extending over a long period of time, and the fact that it was transferred to the corporation as belonging solely to the wife, the husband then being in debt, is open to grave suspicion. The chancellor deemed it fraudulent as against the indebtedness of appellant, and from a careful reading of the testimony we think his finding is amply supported by the evidence. His opportunities for observing the witnesses when testifying, and noting their frankness and candor, are denied us; but, to say the least, the record itself clearly affords ground for such a finding of fact. We think the Appellate Court erred in overruling the finding of fact there made. Its judgment will be reversed and the decree of the circuit court affirmed.

*Judgment reversed.*

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ALBERT YARDE *et al.*

v.

ELIZABETH YARDE.

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*Opinion filed October 19, 1900—Rehearing denied December 6, 1900.*

1. ANTE-NUPTIAL CONTRACTS—*when ante-nuptial contract will be upheld.* An ante-nuptial contract giving the wife a comfortable home, free from taxes and cost of repairs, and an annual income of \$200 for life, in lieu of her rights in the husband's property, worth about \$25,000, will not be set aside as unfair, where the husband was a widower, eighty-one years old, with six living children, and the wife a widow fifty-one years old, who had supported herself and family prior to the marriage, and where she knew substantially the amount of the husband's property, and executed the contract with full knowledge of its effect upon her legal rights and to better her condition in life.

2. WITNESSES—*when wife is not competent witness in her own behalf.* In an action by a widow to set aside an ante-nuptial contract and

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for assignment of dower and homestead, the complainant is not a competent witness to testify in her own behalf as to what was said or took place at the time the contract was signed, where the opposite parties are defending as heirs of her deceased husband.

APPEAL from the Circuit Court of Mercer county; the Hon. HIRAM BIGELOW, Judge, presiding.

GRIER & STEWART, for appellants.

BASSETT & BASSETT, and GEORGE B. MORGAN, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

The appellee obtained a decree in the court below setting aside an ante-nuptial agreement which had been entered into by her and her late husband, Aaron Yarde, and for the assignment of dower and homestead. Her contentions of fact as set forth in her bill and in the arguments of her counsel are, that when she entered into the contract, and at the time of the marriage, said Aaron Yarde owned personal property worth from \$12,000 to \$14,000 and real estate worth about \$20,000, and that she had no knowledge of his personal property or its value; that he kept that matter a secret from her; that she did not know the extent or value of his real estate, any further than the knowledge she had that he owned a farm of 160 acres and three lots in the village of Alexis, in Warren county; that after their engagement he procured her to execute the contract while she was ignorant of its effect and without any one to advise with about it; that he had represented to her that he only wanted a contract to enable his executors to settle his estate with little costs and with dispatch, and that, trusting in him and that he would be just to her, she signed the contract with him. This contract was dated and signed November 7, 1891, and was in the usual form of such agreements. It recited that a marriage was about to be solemnized between the parties; that each had children by former marriages and

that each desired that his or her property should descend to his or her own children, and it was agreed that he should take nothing from her estate in case he survived her, but that if she survived him she should have and hold for her life lot 1, block 4, in Alexis, which was his home place, and should have as her absolute property all of his household goods and furniture, useful and ornamental, in his said residence, and \$200 per annum during the rest of her life, the first payment to be made within thirty days after his death. These annual payments were secured by a charge upon the rents of a certain 83-acre farm described in the contract, and it was provided that all taxes and repairs on the said farm and on said home place, or lot 1, should be borne and paid by his estate during her life. She agreed to accept the provisions thus made for her, in lieu of dower and widow's award and her homestead rights, and in full satisfaction and discharge of all other claims, rights and interests which she might otherwise have to or in his estate or by virtue of their marriage, and agreed also to sign and acknowledge any papers necessary, after his death, to carry into effect said agreement.

The evidence showed that Aaron Yarde owned, at the time the contract was made, 160 acres of land in Mercer county, worth \$7200; 40 acres worth \$2400, which had been devised to him by his former wife, Patience Yarde; lots 5 and 6 in Alexis, worth \$200, which he used as a pasture for his horse; 83 acres in Warren county, worth about \$4000; 17 acres worth about \$1500; lots 2 and 3 in Alexis, worth \$600, then leased and occupied by appellee; lot 1, worth \$1200, the home of Mr. Yarde; and 80 acres in Iowa, the value of which was not shown. At the death of Mr. Yarde his personal property was of the value of about \$14,000, but while the evidence on the question is meager it is to be inferred from the facts proved that about \$6000 of this amount was accumulated after his and appellee's marriage, so that at the time of such mar-

riage the whole of his property, exclusive of the Iowa land, was of the value of \$25,000 or upwards. She had no property except household goods worth \$150. He was then eighty-one and she fifty-one years of age. He had six children,—two sons and four daughters,—all of mature years, one of whom, a widowed daughter, lived with and kept house for him in the interval of eight months between the death of his second wife and his marriage with appellee. Appellee, who had been a widow two years, had eight children, two of whom were minors and continued to live with her after her marriage with Mr. Yarde. She had supported herself and minor children by sewing and other work, and it is apparent from the evidence that her circumstances were greatly improved by her marriage. Mr. Yarde died in 1898, having made his will confirming the marriage settlement and bequeathing and devising all the rest of his property to his six children and appointing his two sons as his executors. They tendered to appellee the first payment of \$200, but she refused to accept it and filed a claim against the estate for upwards of \$3000,—\$1000 of which was for services during her marriage and \$2000 for her alleged share of accumulated earnings during the same period,—and at the April term of the Mercer circuit court, 1899, she filed her bill for relief in this case.

The contentions of appellee's counsel, in addition to actual deceit and fraud charged in the bill, are, that the contract did not make a reasonable provision for the support of the wife; that the parties occupied a confidential relation with each other, and that the burden of proof was upon appellants, as the heirs of the deceased, to prove that before entering into the contract he fully and fairly informed appellee of the character and value of all of his property, and that he failed in this duty, and she, being ignorant of the facts and of her rights in the premises, is not bound by the contract, but may have it set aside in equity as fraudulent in law and also in fact.

We have held in several cases, that where the provision for the wife is disproportionate to the property of the intended husband it raises a presumption of designed concealment, and throws the burden upon those claiming in his right to prove that she had knowledge of the character and extent of his property, or that the circumstances were such that she reasonably ought to have had such knowledge at the time the instrument was executed. (*Taylor v. Taylor*, 144 Ill. 436; *Achilles v. Achilles*, 151 id. 136; *Same v. Same*, 137 id. 589; *Hessick v. Hessick*, 169 id. 486.) It may be conceded that, if the provision made for appellee in the contract and the extent and value of Mr. Yarde's property were alone considered, there was such a disproportion between the two as to call for affirmative proof on the part of appellants to overcome the presumption of concealment and unfairness; but from a consideration of all of the competent evidence in the record we are of the opinion that the contract was not really unfair to appellee, and that, before entering into the contract sought to be set aside, appellee had knowledge of the character and extent of, substantially, all of Mr. Yarde's property, or, at all events, that the circumstances proved were such as to charge her with such knowledge.

There is no evidence to establish the charge of actual fraud or deceit in respect to the purpose of the contract or the amount of his property. It appears that Mr. Yarde went to Monmouth and called upon William C. Norcross, the county judge of Warren county, and asked him to prepare the contract, informing Norcross at the time of the provisions, in substance, which he and appellee desired should be incorporated in the instrument. Judge Norcross had not been Yarde's attorney, but drew the paper, and upon the day agreed upon went to Alexis and met Mr. Yarde at appellee's house, where he read the agreement to both of them at the same time,—some parts of it twice,—and fully explained it. Judge Norcross testified that he considered that he was acting as much for



appellee as for Mr. Yarde, and also that he fully and truthfully explained to her her rights under the law and what they would be under the contract; that in response to questions put by appellee he informed her what the legal rights of a married woman were,—explained her right of dower, of homestead and widow's award, and to one-third of the personal property, after payment of debts, upon her husband's death; told her that in case they were married without any ante-nuptial contract her widow's award alone would probably be about \$1000. She remarked that she would get more in event of marriage without the contract, and was then told that she would get more under the statute out of the personal property alone than the contract would give her. Mr. Yarde then said to her: "Now, if you think you would not be bettering your condition by signing it, do not sign it. I do not know whether you would be bettering your condition or not." He also said at the same time that they had never talked of marriage on any other basis; that he had several daughters with large families and that he did not feel that it would be right for him to make a greater provision for her than the contract provided for; that he could not do it and be just to his children. He also explained what property he contemplated leaving to his children and spoke of his intention to make a will. Appellee and Mr. Yarde had been well acquainted with each other for a great many years. She was at the time of the marriage, and had for many years been, his tenant, occupying a house owned by him on lots 2 and 3 in Alexis, just across the street from his own residence. At different times he and his former wife had boarded with her. The families were intimately acquainted. He had for a long time been known in the village and by her as a man well off financially. It was testified that she said she married him because he was a nice old man with plenty of money. While it was not affirmatively proved that he made to her a specific enumeration of the

property which he possessed and stated its value, we are satisfied, from all of the facts and circumstances proved, that she knew, or ought to have known, that he possessed real and personal property substantially of the amount and value shown by the evidence.

The allegation of the bill that an engagement to marry already existed between the parties at the time the contract was made, and independent of it, was not established, but the evidence tends to show that there was no agreement to marry except upon the basis of the ante-nuptial agreement. Nor, aside from appellee's own testimony, was there any evidence of any concealment or deceit whatever on the part of Mr. Yarde, nor any improper means used to induce her to sign the contract, but that she executed it freely, with full knowledge of the effect it would have upon her legal rights, as the widow of Mr. Yarde, in case she should survive him, and that she did so to improve her own condition in life. She fully understood his reasons for not giving her a larger proportion of his property; knew of his desire to avoid injustice to his children and of his especial wish to provide for his daughters, two of whom were widows with children, needing his assistance. She knew of his advanced age and that in the course of nature he could not live many years, but that she would be well provided for while he did live and would have a comfortable and well furnished house, freed from taxes and the cost of repairs, besides an annual income of \$200, during the rest of her life. The provision thus made for her comfort and support was greater than the income from the rest of the property would have afforded to each of Yarde's children. While the statute would have given her more, we know of no reason why her contract for less than the statutory provision, based upon the consideration of marriage, fairly entered into, should not bind her. Besides, under all of the facts shown we cannot regard the provision so made by this contract as unreasonable, but

are inclined to the same view expressed to the appellee by Mr. Yarde, that had he given her a greater amount of his property he would have done injustice to his children. At any rate, such was the deliberate contract of the parties fairly entered into, and it should not be lightly set aside. She must abide by it.

There was error, also, by the court below in allowing appellee to testify as a witness in her own behalf. The opposite parties were defending as heirs of her deceased husband, and she was not competent to testify to what was said or took place at the time the contract was signed. Counsel for appellee admit this, but say the court did not consider her testimony. From the decree rendered it seems the court must have considered her testimony, for without it the decree should have been for the defendants and the bill dismissed. We are not unmindful of the principles announced and settled by the cases cited *supra* and relied on by appellee, but the facts in those cases differ widely from the facts in this case, and the principles of equity there stated do not require an affirmance of this decree.

The decree is reversed and the cause remanded, with directions to dismiss the bill.

*Reversed and remanded, with directions.*



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